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SC PUBLIC SERVICE COMMISSION

September 7, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.
Docket No. 2005-82-C

Dear Mr. Terreni:

Enclosed for filing are an original and twenty five copies of the prefiled Direct Testimony of BellSouth Telecommunications, Inc.'s witness Ms. Michael Willis in the above-referenced matter.

Also enclosed for filing are an original and ten copies of BellSouth's Motion for Summary Disposition. This Motion is supported by Ms. Willis' prefiled Direct Testimony and the exhibits thereto.

As explained more fully in the enclosed Motion, NuVox and BellSouth negotiated and voluntarily entered into the Agreement under which they are operating, and this Commission approved the Agreement. The negotiated Agreement allows NuVox to convert its special access circuits (to which tariffed prices apply) to combinations of unbundled network elements ("UNEs") known as "EELs"[1] (to which much lower TELRIC prices apply), but only so long as NuVox uses those EELs to provide a "significant amount of local exchange service." The Agreement, therefore, requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.

[1] "EEL" stands for "enhanced extended link." While not an unbundled network element itself, an EEL is comprised of an unbundled loop (including multiplexing/concentration equipment) and unbundled dedicated transport. *Net 2000 Communications, Inc. v. Verizon,* 17 FCC Rcd. 1150 at ¶3 (2001).

The Agreement does not require BellSouth to blindly accept NuVox's self-certification from that day forward. Instead, the Agreement allows BellSouth to audit any of NuVox's EELs. Under the language the parties negotiated, the only express qualifications of BellSouth's audit rights are that: (1) BellSouth provide NuVox 30 days' notice of the audit; (2) the audit is at BellSouth's sole expense; and (3) unless an audit finds non-compliance with specified matters, BellSouth may audit NuVox's records not more than once in any twelve month period.

NuVox has converted approximately 572 circuits in South Carolina from special access to EELs. BellSouth has sought to audit NuVox's EELs in strict accordance with the language of the Agreement, but NuVox has refused the audit. Despite the clarity of its contractual obligation, NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Agreement; (2) linked its "concern" or "concerns" to each and every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a suitably "independent auditor" to conduct the audit "in accordance with AICPA[2] standards." No such pre-conditions to an audit appear in the Agreement's EELs audit provisions, or anywhere else in the Agreement the parties negotiated. But, this has not stopped NuVox from blocking the audit anyway.

To support its refusal to allow BellSouth to conduct an audit, NuVox relies on certain provisions of the Federal Communications Commission's ("FCC's") *Supplemental Order Clarification*, which NuVox claims are incorporated by reference into the Agreement by virtue of a generic "compliance with all laws" clause found in the General Terms & Conditions section of the Agreement. NuVox's reliance on these provisions of the *Supplemental Order Clarification* suffers from the following fatal flaws:

1. The *Supplemental Order Clarification* upon which NuVox relies was released before NuVox and BellSouth negotiated and voluntarily entered into "a binding agreement . . . without regard to the standards set forth in subsections (b) and (c) of section 251 of [the federal Act]."[3] As a matter of law, therefore, the plain language of the Agreement – and not NuVox's erroneous and conflicting interpretation of provisions of a pre-existing FCC Order – govern the parties respective audit rights.

2. The Agreement the Parties negotiated and voluntarily entered into contains a merger clause. That merger clause provides that neither Party is bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in the Agreement. In the Agreement, the Parties "expressly stated" that the

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2 "AICPA" stands for American Institute for Certified Public Accountants.
3 *See* 47 U.S.C. §252(a)(1).

provisions of two specific paragraphs of the *Supplemental Order Clarification* were incorporated by reference into the agreement. Pursuant to the unambiguous language of the Agreement, therefore, those specific paragraphs – and only those specific paragraphs – of the *Supplemental Order Clarification* apply to the Agreement, and those paragraphs do not support NuVox's contentions.

3. Even if the *Supplemental Order Clarification* overrides the provisions of the Agreement that the Parties subsequently negotiated and voluntarily entered into (which it does not), NuVox's interpretation of the *Supplemental Order Clarification* is erroneous, and that *Order* does not impair BellSouth's contractual right to audit NuVox's EELs.

NuVox's refusal to honor its contractual audit commitments has now caused BellSouth to seek enforcement of its audit rights in five other states.[4] It is time for NuVox's South Carolina EELs to be audited as expressly agreed. In South Carolina, this will only happen upon order of this Commission which BellSouth, accordingly, seeks.

The facts set forth in BellSouth's Motion (which are supported by the Ms. Willis' prefiled Direct Testimony and the Exhibits thereto) cannot reasonably be disputed. Summary disposition of this matter is appropriate, therefore, because there is no genuine issue of material fact for the Commission to decide. BellSouth, therefore, requests that the Commission summarily enter an Order granting the relief BellSouth seeks in its Complaint.

By copy of this letter, I am serving all parties of record with a copy of Ms. Willis' prefiled Direct Testimony and of BellSouth's Motion as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 #600837

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[4] BellSouth has not sought to audit NuVox's EELs in the remaining three states in BellSouth's region because the number of NuVox EELs in those states currently is minimal.

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BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF MICHAEL E. WILLIS

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2005-82-C

September 7, 2005

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Michael E. Willis. I am currently a Manager – Regulatory and Policy Support in the Interconnection Services organization. My business address is 675 W. Peachtree Street, Atlanta, Georgia, 30375.

Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from the University of Kansas in 1992 with a Bachelor of Science degree in Business Communications Studies. I began my career in 1997 at MCI Telecommunications, Inc. in the Carrier Agreements organization as Documentation Manager. In the fall of 1998, I began employment with BellSouth in the Interconnection Services organization. I have held various positions involving negotiations, strategic pricing, product management, and regulatory and policy support within BellSouth Interconnection Services. In addition, I have

participated in several allowable ex parte briefings with the Federal Communications Commission ("FCC"). I have held my present position since August 2003.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

A. The purpose of my testimony is to present evidence that supports BellSouth's position in this docket. BellSouth's legal position is briefly summarized in the Motion for Summary Disposition that was filed with the Commission on the same day as my direct testimony, and it will be thoroughly addressed in BellSouth's post-hearing brief if one is necessary.

Q. PLEASE BRIEFLY EXPLAIN HOW YOUR DIRECT TESTIMONY IS ORGANIZED.

A. My direct testimony is organized in the following manner:

First, I provide a brief summary of BellSouth's position and the relief BellSouth is requesting from the Commission;

Second, I explain the events that led to the dispute that is the subject of this docket;

Third, I explain BellSouth's concerns regarding NuVox's EEL self-certifications (although, as explained below, BellSouth is not required to demonstrate any such "concern" in order to conduct an audit of NuVox's EELs); and

Fourth, I explain why NuVox's concerns regarding BellSouth's selection of an auditor are unfounded.

I. BRIEF SUMMARY OF BELLSOUTH'S POSITION & RELIEF REQUESTED

Q. COULD YOU BRIEFLY SUMMARIZE BELLSOUTH'S POSITION IN THIS PROCEEDING?

A. Yes. NuVox and BellSouth negotiated and voluntarily entered into the Interconnection Agreement ("the Agreement") under which they are operating, and this Commission approved the Agreement. The negotiated Agreement allows NuVox to convert its special access circuits (to which tariffed prices apply) to combinations of unbundled network elements ("UNEs") known as "EELs"[1] (to which much lower TELRIC prices apply), but only so long as NuVox uses those EELs to provide a "significant amount of local exchange service." The

[1] "EEL" stands for "enhanced extended link." While not an unbundled network element itself, an EEL is comprised of an unbundled loop (including multiplexing/concentration equipment) and unbundled dedicated transport. *Net 2000 Communications, Inc. v. Verizon,* 17 FCC Rcd. 1150 at ¶3 (2001).

Agreement requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.

The Agreement allows BellSouth to audit any of NuVox's EELs. Under the language the parties negotiated, the only express qualifications of BellSouth's audit rights are that: (1) BellSouth provides NuVox 30 days' notice of the audit; (2) the audit is at BellSouth's sole expense; and (3) unless an audit finds non-compliance with specified matters, BellSouth may audit NuVox's records not more than once in any twelve month period.

NuVox has converted approximately 572 circuits in South Carolina from special access to EELs. BellSouth has sought to audit NuVox's EELs in strict accordance with the language of the Agreement, but NuVox has refused the audit. NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Agreement; (2) linked its "concern" or "concerns" to each and every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a suitably "independent auditor" to conduct the audit "in accordance with AICPA[2] standards."

[2] "AICPA" stands for American Institute for Certified Public Accountants.

No such pre-conditions to an audit appear in the Agreement's EELs audit provisions, or anywhere else in the Agreement the parties negotiated. But, this has not stopped NuVox from blocking the audit anyway.

To support its refusal to allow BellSouth to conduct an audit, NuVox relies on certain provisions of the Federal Communications Commission's ("FCC's") *Supplemental Order Clarification*, which NuVox claims are incorporated by reference into the Agreement by virtue of a generic "compliance with all laws" clause found in the General Terms & Conditions section of the Agreement. I am not a lawyer, and I defer to BellSouth's attorneys regarding the legal merits of NuVox's positions, but as explained below, I did participate in the negotiations leading to the Agreement the parties entered into, and I will provide testimony regarding the timing of these FCC Orders in relation to the execution of the Agreement by the parties.

NuVox's refusal to honor its contractual audit commitments has now caused BellSouth to seek enforcement of its audit rights in five other states.[3] It is time for NuVox's South Carolina EELs to be audited as expressly agreed. In South Carolina, this will only happen upon order of this Commission which BellSouth, accordingly, seeks.

[3] BellSouth has not sought to audit NuVox's EELs in the remaining three states in BellSouth's region because the number of NuVox EELs in those states currently is minimal.

Q. WHAT RELIEF IS BELLSOUTH SEEKING IN THIS PROCEEDING?

A. The relief BellSouth is seeking is set forth in the Complaint it filed with the Commission on March 29, 2005. In summary, BellSouth is seeking an order from this Commission that:

(1) finds that NuVox has breached its Interconnection Agreement with BellSouth by failing to permit BellSouth to audit NuVox's EEL circuits that NuVox has self-certified as providing "a significant amount of local exchange service";

(2) orders NuVox to allow such an audit of its records immediately and to cease and desist any further activity designed to delay, stall, or otherwise obstruct the audit;

(3) requires NuVox to cooperate in such an audit by providing the auditors selected by BellSouth with appropriate working facilities and access to any required records in a manner that will allow the timely conduct and completion of the audit;

(4) clarifies that BellSouth is authorized to provide the auditor with whatever BellSouth records the auditor may reasonably require in conducting the audit, including records in BellSouth's possession

that contain proprietary information of another carrier or carriers;

(5) reserves BellSouth's rights, if the audit reveals non-compliance, to present evidence of such non-compliance to the Commission and to seek an order finding that BellSouth is entitled to the all relief provided for by the Agreement including, without limitation, interest on the amount of the difference between the applicable special access rate(s) and the EEL rates paid by NuVox, per circuit ultimately found to be noncompliant, from the date of non-compliance or any earlier date on which use of the circuits ceased for the circuits identified already by BellSouth, and any circuits later identified as a result of the audit so ordered; and

(6) provides such other and further relief as the Commission deems fair and equitable.

II. EVENTS LEADING UP TO THIS DISPUTE

Q. COULD YOU EXPLAIN HOW YOUR DISCUSSION OF THE EVENTS LEADING UP TO THIS DISPUTE IS ORGANIZED.

A. Yes. First, I will explain how the FCC's *Supplemental Order* came about. Next, I will discuss how the FCC's *Supplemental Order Clarification* upon which

NuVox relies came about. Then, I will discuss the relevant language in the Agreement the parties negotiated and entered into after the FCC issued these two Orders. Next, I will discuss the EELs that NuVox has converted pursuant to the Agreement. Finally, I will address NuVox's refusal to permit BellSouth to audit NuVox's EELs.

A. The FCC's *Supplemental Order*

Q. PLEASE EXPLAIN HOW THE FCC'S *SUPPLEMENTAL ORDER* CAME ABOUT.

A. In 1999, the FCC issued an Order responding to the Supreme Court's January 1999 decision that overturned many aspects of the unbundling rules the FCC had previously promulgated.[4] In that Order, the FCC concluded that any requesting carrier was entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at UNE prices.[5]

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C. Rcd. 1724 at ¶1 (November 5, 1999).

[5] *Id.* at ¶486.

Many parties petitioned the FCC to reconsider various portions of that Order and, in response to those petitions, the FCC issued its *Supplemental Order* on November 24, 1999.[6]

Q. DID THE *SUPPLEMENTAL ORDER* ADDRESS THE PORTIONS OF THE 1999 ORDER THAT YOU JUST MENTIONED?

A. Yes. In the *Supplemental Order*, the FCC modified its prior conclusion "to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements of this Order."[7]

The FCC held that this constraint "does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer."[8] It further held that this constraint "therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service."[9] The FCC further stated: "we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local

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[6] Supplemental Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 1760 (November 24, 1999). Exhibit MEW-1 to my Direct Testimony is a copy of the *Supplemental Order*.

[7] *Id.* at ¶4.

[8] *Id.* at ¶5.

[9] *Id.*

exchange service," and "[b]ecause we intend the constraint we identify in this order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service."[10]

B. The FCC's *Supplemental Order Clarification*

Q. PLEASE EXPLAIN HOW THE FCC'S *SUPPLEMENTAL ORDER CLARIFICATION* CAME ABOUT.

A. On June 2, 2000, the FCC issued its *Supplemental Order Clarification*,[11] which clarified certain issues from the *Supplemental Order* regarding the "ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*."[12]

In the *Supplemental Order Clarification*, the FCC allowed competitive local exchange carriers ("CLECs") to obtain EELs upon self-certification that a significant amount of local exchange service would be provided over the EEL

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10 *Id.* at n. 9.

11 Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 9587 (June 2, 2000). Exhibit MEW-2 to my Direct Testimony is a copy of the *Supplemental Order Clarification*.

12 *Id.* at ¶ 1.

combinations.[13] The FCC also established three "safe harbors" that a CLEC can use to demonstrate its compliance with the *Order's* "significant amount of local exchange service" requirement,[14] and it granted the ILECs the right to audit the circuits after conversion to verify compliance with the "significant amount of local exchange service" requirement.[15]

In the *Supplemental Order Clarification*, the FCC also stated that "[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent necessary to determine a requesting carrier's compliance with the local usage options."[16]

The FCC also stated that "in many cases, . . . interconnection agreements already contain audit rights," and it stated "[w]e do not believe that we should restrict parties from relying on these agreements."[17]

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13 *Id.*
14 *Id.* at ¶22.
15 *Id.* at ¶ 1
16 *See Supplemental Order Clarification*, ¶ 29
17 *Id.*

C. The Agreement.

Q. WERE YOU INVOLVED IN NEGOTIATING THE AGREEMENT UNDER WHICH NUVOX AND BELLSOUTH CURRENTLY ARE OPERATING?

A. Yes, I was directly involved in the negotiation of the Agreement.

Q. WAS NUVOX THE ORIGINAL PARTY TO THE AGREEMENT?

A. No. TriVergent Communications, Inc. was the original party. NuVox is the successor in interest to TriVergent and, therefore, NuVox is now the party to that Agreement. In order to avoid confusion, I will use NuVox (rather than TriVergent) in describing how the Agreement came into being.

Q. WERE NUVOX AND BELLSOUTH AWARE OF THE FCC'S *SUPPLEMENTAL ORDER CLARIFICATION* WHILE THEY WERE NEGOTIATING THE AGREEMENT?

A. Yes. The *Supplemental Order Clarification* was released before NuVox and BellSouth entered into the Agreement. The parties discussed the Agreement during negotiations and, as I will explain below, the Agreement expressly incorporates Paragraph 22 of the *Supplemental Order Clarification* and it

expressly allows NuVox to self-certify "in the manner specified by paragraph 29" of the *Supplemental Order Clarification*.

Q. WHAT IS THE EFFECTIVE DATE OF THE AGREEMENT?

A. June 30, 2000 (after the release of the *Supplemental Order Clarification*).

Q. WHAT IS THE GEOGRAPHIC SCOPE OF THE AGREEMENT?

A. NuVox and BellSouth entered into the Agreement to govern their relationship in South Carolina and each of the remaining eight states in BellSouth's operating territory.

Q. WAS THE AGREEMENT ARBITRATED BY THIS OR ANY OTHER STATE COMMISSION PURSUANT TO SECTION 252 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996?

A. No. The Agreement was not the subject of any arbitration proceedings. Instead, NuVox and BellSouth negotiated and voluntarily entered into the Agreement. The Agreement was filed with this Commission on August 15, 2000 and was approved in accordance with section 252(e) of the federal Act. Exhibit MEW-3 to my Direct Testimony is a copy of a letter from the Commission stating that it approved the Agreement.

Q. DOES THE AGREEMENT CONTAIN PROVISIONS ADDRESSING NUVOX'S ABILITY TO ORDER EELS FROM BELLSOUTH?

A. Yes. The Agreement provides: "Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to loop and transport combinations, also known as Enhanced Extended Link ("EEL") as defined in Section 10.3 below [which describes the various types of EELs combinations]."[18]

Q. DOES THE AGREEMENT CONTAIN PROVISIONS ADDRESSING NUVOX'S ABILITY TO CONVERT SPECIAL ACCESS CIRCUITS TO EELS?

Yes. The Agreement allows NuVox to convert its special access circuits (to which tariffed prices apply) to EELs (to which much lower TELRIC prices apply), but only so long as NuVox uses those EELs to provide a "'significant amount of local exchange service' (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer."[19]

[18] Agreement, Att. 2, § 10.2.1. Exhibit MEW-4 to my Direct Testimony is a copy of the General Terms and Conditions of the Agreement and of the EEL provisions of Attachment 2 to the Agreement.

[19] Agreement, Att. 2, § 10.5.1.

Q. DOES THE AGREEMENT DEFINE THE TERM "SIGNIFICANT AMOUNT OF LOCAL EXCHANGE SERVICE?"

A. Yes. To define the term "significant amount of local exchange service," the Agreement expressly references paragraph 22 of the FCC's *Supplemental Order Clarification*.[20] Specifically, the Agreement provides that "[t]he Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 [*Supplemental Order Clarification*]," which provides three scenarios under which a CLEC may self-certify compliance with the "significant amount of local exchange service" requirement.[21] Thus, the Agreement requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs.[22]

Q. DOES THE AGREEMENT ADDRESS THE SUBJECT OF EEL AUDITS?

A. Yes. The Agreement allows BellSouth to audit any of NuVox's EELs.[23] Specifically, Section 10.5.4 of Attachment 2 to the Agreement states:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order,

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[20] Agreement, Att. 2, § 10.5.2.

[21] Agreement, Att. 2, § 10.5.2 (citing *Supplemental Order Clarification* ¶ 22).

[22] Agreement, Att. 2, § 10.5.2.

[23] Agreement, Att. 2, § 10.5.4.

in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].[24]

D. NuVox's EELs.

Q. HAS NUVOX CONVERTED ANY SPECIAL ACCESS CIRCUITS TO EELS IN SOUTH CAROLINA?

A. Yes. Pursuant to the Agreement's conversion provisions, as of March 2002, NuVox converted approximately 572 special access circuits to EELs in South Carolina, starting in 2000.

[24] Agreement, Att. 2, § 10.5.4.

Q. DID NUVOX PROVIDE ANY CERTIFICATIONS TO BELLSOUTH REGARDING THOSE CONVERSIONS?

A. Yes. NuVox self-certified that these EEL facilities were being used to provide a "significant amount of local exchange service." In support of its self-certification, NuVox stated that it was the "exclusive provider of local exchange service" for its South Carolina customers.[25]

Q DID BELLSOUTH REQUEST AN AUDIT OF ANY OF THESE CIRCUITS PRIOR TO PROVISIONING THE CONVERSION AS REQUESTED BY NUVOX?

A. No. At no time did BellSouth demand or request an audit of any NuVox circuits prior to provisioning the conversions.

[25] This particular option is one of the three potential options for NuVox to self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att. 2, § 10.5.2, (citing *Supplemental Order Clarification* ¶ 22).

E. BellSouth's Audit Requests and NuVox's Refusal.

Q. AFTER PROVISIONING THE CONVERSIONS AS REQUESTED BY NUVOX, DID BELLSOUTH LATER SEEK TO AUDIT NUVOX'S EELS?

A. Yes. On March 15, 2002, in accordance with the terms of the Agreement, BellSouth sent NuVox a letter providing 30 days' notice of BellSouth's intent to audit NuVox's EELs.[26] BellSouth advised in the letter that the purpose of the audit was to "verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC *Supplemental Order*." BellSouth informed NuVox that it had selected an independent auditor to conduct the audit, and that BellSouth would incur the costs of the audit. BellSouth forwarded a copy of the audit request letter to the FCC.

Q. AT ANY TIME PRIOR TO MARCH 15, 2005, HAD BELLSOUTH AUDITED NUVOX'S EELS?

A. No.

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[26] Exhibit MEW-5 to my Direct Testimony is a copy of this letter.

Q. HOW DID NUVOX RESPOND TO BELLSOUTH'S REQUEST TO AUDIT NUVOX'S EELS?

A. NuVox refused to permit the audit. NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Agreement; (2) linked its "concern" or "concerns" to each and every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a suitably "independent auditor" to conduct the audit "in accordance with AICPA[27] standards."

Q. IS BELLSOUTH WILLING TO UNDERTAKE THE AUDIT AT ITS SOLE EXPENSE?

A. Yes.

Q. HAVE THE PARTIES DISCUSSED THE AUDIT REQUEST?

A. Yes. Since the March 15, 2002 audit notice, the parties have exchanged correspondence and verbal communications -- BellSouth seeking to audit the EELs, and NuVox refusing to permit the audit as sought. BellSouth has disagreed entirely with NuVox's positions, and has repeatedly stated that the Agreement

[27] "AICPA" stands for American Institute for Certified Public Accountants.

does not permit NuVox to block or delay the audit on any of NuVox's stated grounds.

Q. ARE YOU AWARE OF ANYTHING THAT TOOK PLACE DURING THE PARTIES' NEGOTIATION OF THE AGREEMENT THAT SUPPORTS BELLSOUTH'S POSITION THAT IT IS ENTITLED TO IMMEDIATELY AUDIT NUVOX'S EELS OR THAT REFUTES NUVOX'S POSITION THAT BELLSOUTH IS NOT ENTITLED TO IMMEDIATELY AUDIT NUVOX'S EELS?

A. Yes, I am aware of several facts regarding the negotiation of the Agreement that support BellSouth's position and that refute NuVox's position.

Q. HAVE YOU ADDRESSED THOSE FACTS IN YOUR DIRECT TESTIMONY?

A. No.

Q. WHY NOT?

A. As explained in detail in the Motion for Summary Disposition that was filed with the Commission on the same day as my direct testimony, BellSouth's position is that the terms of the Agreement unambiguously entitle BellSouth to the relief it seeks and that it is inappropriate to go beyond the plain words of the Agreement

in this proceeding. Therefore, I am not addressing matters that arose during negotiations in my direct testimony. I reserve the right to do so, if necessary and appropriate, in my rebuttal testimony.

III. BELLSOUTH'S CONCERNS REGARDING NUVOX'S CERTIFICATIONS

Q. DOES BELLSOUTH AGREE WITH NUVOX' ASSERTION THAT IN ORDER TO CONDUCT AN AUDIT OF BELLSOUTH'S EELS, BELLSOUTH MUST DEMONSTRATE A "CONCERN" REGARDING NUVOX'S EEL CERTIFICATIONS?

A. No. The reasons for BellSouth's position on this issue are explained in BellSouth's Motion for Summary Disposition that was filed with the Commission on the same day as my direct testimony.

Q. WITHOUT WAIVING THAT POSITION, DID BELLSOUTH HAVE A "CONCERN" WITH REGARD TO NUVOX'S EEL CERTIFICATIONS WHEN IT SOUGHT TO AUDIT NUVOX'S EELS?

A. Yes. Each month, BellSouth monitors data related to the amount of local traffic being passed to BellSouth by each CLEC that purchases EELs from BellSouth. Several months prior to March 2002, BellSouth observed that the local exchange traffic that was being passed from NuVox to BellSouth in Florida and Tennessee

was noticeably low. This raised a concern because NuVox had self-certified that it was entitled to convert special access circuits to EELs because the EELs would be or were being used to provide a "significant amount of local exchange service." The concern was heightened because NuVox actually had certified that NuVox is the "exclusive provider of local exchange service" for the end users being served by those EELs.

Q. WHAT DID BELLSOUTH DO AS A RESULT OF THIS CONCERN?

A. BellSouth examined other records to determine if they confirmed a concern regarding NuVox's EEL certifications.

Q. WHY DID BELLSOUTH DECIDE TO EXAMINE THESE OTHER RECORDS?

A. We knew, based on experience in other states, that NuVox would continue to deny BellSouth's request for an audit. Because we could not yet audit NuVox's EELs, BellSouth decided to review other available records to determine whether they confirmed the concerns regarding NuVox's EEL certifications.

Q. WHAT DID BELLSOUTH'S EXAMINATION OF ITS RECORDS REVEAL?

A. In July 2003, BellSouth examined its records for the six BellSouth states in which

NuVox has ordered EELs from BellSouth. This examination revealed that end users that NuVox was serving or had served with 271 EELs (including 19 in South Carolina) were also receiving or had also received local exchange service from BellSouth at the same location.

BellSouth examined its records again in early July 2004. This examination revealed that end users that NuVox was serving or had served with 363 EELs (including 44 in South Carolina) were also receiving or had also received local exchange service from BellSouth at the same location.

Q DOES THIS INFORMATION CONFIRM BELLSOUTH'S CONCERNS REGARDING NUVOX'S EEL CERTIFICATIONS?

A. Yes, it does. NuVox had self-certified that it was the "exclusive provider of local exchange service" for the end users it serves via EELs. BellSouth's records revealed that this was not the case for a significant number of these end users – NuVox clearly is not the "exclusive provider of local exchange service" to an end user who also purchases local exchange service from BellSouth at the same location.

Q. DOES THIS INFORMATION REFLECT THE FULL EXTENT OF BELLSOUTH'S CONCERNS REGARDING NUVOX'S EEL CERTIFICATIONS?

A. No. This information only addresses situations in which BellSouth is providing local exchange service to an end user that is the subject of NuVox's "exclusive provider of local exchange service" self-certification. BellSouth did not check its records to see if any *other* local service providers were serving these end users.

In other words, if a CLEC also was providing local service to an end user that NuVox has certified was receiving local service exclusively from NuVox, that situation would not have been captured in the records BellSouth reviewed.

In all likelihood there are such situations in South Carolina, which means that BellSouth's concerns are even more pronounced than the information discussed above indicates.

Q. COULD YOU REMIND THE COMMISSION OF WHAT THE AGREEMENT SAYS ABOUT BELLSOUTH'S AUDIT RIGHTS?

A. The Agreement says that "BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage

options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements."

Q. IF BELLSOUTH IS REQUIRED TO DEMONSTRATE A "CONCERN" PRIOR TO CONDUCTING AN AUDIT (AND BELLSOUTH DOES NOT BELIEVE THAT IT IS), DOES THE INFORMATION YOU JUST PROVIDED DEMONSTRATE SUCH A "CONCERN?"

A. Yes. The Agreement says that the purpose of an audit is "to verify the type of traffic being transmitted over combinations of loop and transport network elements." At a minimum, the information I just provided creates a "concern" that NuVox's self-certification that was or is the "exclusive provider of local exchange service" for the end users being served by those EELs is inaccurate with regard to at least 44 out of 572 circuits (or, nearly 10% of the circuits NuVox has converted) in South Carolina. This is more than enough of a "concern" to warrant an audit to verify the validity of NuVox's self-certification regarding its EELs in South Carolina.

Q. DOES THE AGREEMENT STATE WHAT WILL HAPPEN IF, BASED ON AN AUDIT, BELLSOUTH CONCLUDES THAT NUVOX IS NOT PROVIDING A SIGNIFICANT AMOUNT OF LOCAL EXCHANGE TRAFFIC OVER ITS EELS IN SOUTH CAROLINA?

A. Yes, it does, and it is important to note that the Agreement does not provide any "self-help" mechanism to BellSouth.

Instead, the Agreement provides: "If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement.

Q. IS BELLSOUTH'S RIGHT TO AUDIT LIMITED ONLY TO THE CIRCUITS FOR WHICH CONCERN HAS BEEN DEMONSTRATED?

A. No.

Q. WHICH PARTY BEARS THE EXPENSE OF ANY EEL AUDIT THAT IS CONDUCTED PURSUANT TO THE AGREEMENT?

A. As noted above, BellSouth bears the expense of conducting an EEL audit under

the Agreement.

IV. NUVOX'S CONCERNS REGARDING THE AUDITOR

Q. DOES THE AGREEMENT REQUIRE BELLSOUTH TO HIRE AN INDEPENDENT AUDITOR TO CONDUCT THE AUDIT?

A. No. Nothing in the Agreement requires that BellSouth hire an "independent auditor" to conduct EELs audits.

Q. DOES BELLSOUTH INTEND TO USE AN INDEPENDENT AUDITOR?

A. Yes. While BellSouth is not obligated to use an independent auditor, it intends to do so.

Q. WHAT COMPANY DOES BELLSOUTH INTEND TO USE TO AUDIT NUVOX'S EELS IN SOUTH CAROLINA?

A. American Consultants Alliance.

Q. IS ACA AN INDEPENDENT AUDITOR?

A. Yes. ACA is not related to or affiliated with BellSouth in any way, it is not

subject to the control or influence of BellSouth, and it is not dependent on BellSouth.

Q. HAS BELLSOUTH USED ACA TO CONDUCT ANY AUDITS IN THE PAST?

A. No, BellSouth has not employed ACA or its principals in the past.

Q. ARE THERE ANY INCENTIVES FOR ACA TO BE BIASED IN THEIR CONDUCT OF THE REQUESTED AUDIT?

A. No. ACA is in the business of consulting and auditing, and it has many other clients in addition to BellSouth. It is in the firm's best interest to maintain a reputation of impartiality. Furthermore, under BellSouth's arrangement with ACA, ACA is to be paid on an hourly basis without regard to the audit results.

Q. DOES BELLSOUTH WANT TO USE AN IMPARTIAL AUDITOR?

A. Yes. It would not make sense for BellSouth to choose an auditor lacking in independence, experience, or professionalism. An improper audit would be revealed immediately and would only harm BellSouth's interests.

As noted above, the Agreement states that if BellSouth finds non-compliance through an audit, its remedy is to file "a complaint with the appropriate

Commission pursuant to the dispute resolution process as set forth in this Agreement." If BellSouth had to file such a complaint, the audit results would most likely be contested by NuVox and would be scrutinized by this Commission. Any audit lacking credibility would be readily exposed, and BellSouth would gain nothing.

V. CONCLUSION

Q. HOW SHOULD THE COMMISSION RESOLVE THIS MATTER?

A. The Commission should grant BellSouth the relief requested in its Complaint and as summarized above in Part I of my direct testimony.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes, it does.

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EXHIBIT MEW-1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

SUPPLEMENTAL ORDER

Adopted: November 24, 1999 **Released: November 24, 1999**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On September 15, 1999, we adopted the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in this docket responding to the Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996. (1996 Act).[1] We hereby modify that Order with regard to the use of unbundled network elements to provide exchange access services.[2]

2. We conclude that, until resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

II. DISCUSSION

3. In the *Third Report and Order and Fourth FNPRM*, we concluded that we would address in the Fourth FNPRM whether there were any legal or policy ramifications of applying

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth FNPRM*) (citing *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)).

[2] *Id.* at paras. 483-89.

our unbundling rules in a way that could "cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform."[3] We also concluded, in paragraph 486, that any requesting carrier is entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices, and that a carrier that is collocated in a serving wire center is free to order combinations of loops and dedicated transport to that serving wire center as unbundled network elements as a substitute for the incumbent LECs' regulated special access services.[4]

4. Since the release of the *Third Report and Order and Fourth FNPRM*, several incumbent LECs have claimed that we did not sufficiently preserve the special access issue in the Fourth FNPRM. Specifically, they contend that paragraph 486 allows collocated IXCs that self-provision entrance facilities (or obtain them from third parties) to convert the remaining portions of their special access circuits to unbundled network elements, even though the IXCs are not using the facilities to provide local exchange service. They contend that this would have significant effects in the competitive local exchange market as had been asserted previously to the Commission by BellSouth.[5] We intended to compile a complete record in the Fourth FNPRM prior to determining whether IXCs may employ unbundled network elements solely to provide exchange access service.[6] Accordingly, in order to preserve this issue in the Fourth FNPRM as we intended, we modify our conclusion in paragraph 486 to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements in this Order.[7] We also modify our conclusion in paragraph 489 to the extent that it limited our concerns to entrance facilities.[8] We now conclude that, until

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[3] *Id.* at para. 489.

[4] *Id.* at para. 486.

[5] *See* Letter from Michael Kellogg, on behalf of SBC, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 18, 1999); Letter from Dee May, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 17, 1999); Letter from William B. Barfield, Associated General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Ex Parte*). BellSouth's *Aug. 9, 1999 Ex Parte* indicated that the use of combinations of unbundled loops and transport solely for exchange access service would either increase the incumbent's local rates or undermine universal service, or both. *BellSouth Aug. 9, 1999 Ex Parte* at 1. We underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and we therefore now, as explained herein, include combinations of unbundled loops and transport network elements within the scope of this temporary constraint.

[6] *See Third Report and Order and Fourth FNPRM* at para. 496.

[7] *Id.* at para. 486 (stating that it would be impermissible for incumbent LECs to require that a requesting carrier provide a certain amount of local service over combinations of unbundled loop and transport facilities).

[8] *Id.* at para. 489 (stating that we will consider in the Fourth FNPRM the "discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or 'entrance facilities')."

resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This will give us sufficient time to issue an order addressing the Fourth FNPRM.

5. This constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[9] It therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service. It also does not affect the ability of competitive LECs that are collocated and have self-provided transport (or obtained it from third parties), but are purchasing unbundled loops, to provide exchange access service. As we stated in paragraph 487 of the *Third Report and Order and Fourth FNPRM*, such a competitive carrier is entitled to purchase unbundled loops in order to provide advanced services (*e.g.*, interstate special access xDSL service).[10] Finally, the constraint will have no effect on competitive LECs using long distance switches to provide local exchange service.

6. We also expand the scope of the Fourth FNPRM to seek comment on whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide combinations of loops and transport network elements at unbundled network element prices. We also seek comment on the argument that the "just and reasonable" terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on combinations of unbundled loops and transport network elements. Parties should also address whether there is any other statutory basis for limiting an incumbent LEC's obligation to provide combinations of loops and transport facilities as unbundled network elements. As we stated in the *Third Report and Order and Fourth FNPRM*, in light of the fact that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements,[11] we particularly urge parties to consider and address what long term solutions may be necessary to avoid adverse effects on any special access revenues that support universal service.

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[9] For example, we would consider the local service component as described in a joint Ex *Parte* submitted by Intermedia to be significant. *See* Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999). In addition, we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local exchange service. Because we intend the constraint we identify in this Order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service. We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions.

[10] *Third Report and Order and Fourth FNPRM* at para. 487.

[11] *Id.* at para. 484.

7. This temporary constraint on the use of combinations of unbundled loops and transport network elements to provide exchange access service is consistent with the Commission's finding in the *Local Competition First Report and Order*, that we may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges.[12] We believe that this short-term constraint will avoid disturbing the status quo while we consider the legal and economic implication of allowing carriers to substitute combinations of unbundled loops and transport network elements for the incumbent LECs' special access services. As we did in the *Local Competition First Report and Order*, we emphasize that this constraint will apply only as an interim measure.[13]

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

8. In the *Third Report and Order and Fourth FNPRM*, we conducted a Final Regulatory Flexibility Analysis, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603. The changes we adopt in this Order do not affect that analysis.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission amends paragraph 486, 489, and 494-96 in the *Third Report and Order and Fourth FNPRM* to be consistent with the discussion set out above. Thus, the constraint on the use of unbundled network elements as a substitute for special access service and the scope of the corresponding inquiry in the Fourth FNPRM are not limited to entrance facilities, but instead include combinations of unbundled loops and transport network elements. This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd at 15499, 15862-69, paras. 716-32 (1996) (*Local Competition First Report and Order*).

[13] *Id. at* 15866, para. 725.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, CC Docket 96-98.

I dissent from the Commission's modification of its *Third Report & Order* in this docket, in which the Commission broadens the restriction it placed on competing carriers' uses of combinations of unbundled loops and transport network elements. Not only is the order procedurally defective, but also the Commission's use restrictions are without a basis in the statute.

First, I believe that, in issuing this order, the Commission has failed to comply with statutory procedural requirements. An agency may not fundamentally reinterpret a published order or regulation without complying with the Administrative Procedure Act's notice and comment provisions. *See* 5 U.S.C. § 551. The United States Court of Appeals for the District of Columbia has recognized that, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *See Alaska Professional Hunters Ass'n v. FAA*, 177 F. 3d 1030, 1035 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."); *see also National Whistleblower Center v. Nuclear Regulatory Commission*, 1999 WL 1024662, at * 4 (D.C. Cir. Nov. 12, 1999) ("[T]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements.") (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997). In my opinion, it is improper for the Commission to modify its prior position on this issue without first having made the public aware that it was considering changing its order and without first having obtained comment from interested parties.

Second, as I explained when the Commission released the *Third Report & Order*, the statute simply does not authorize the Commission to limit the uses to which a competing carrier may put an unbundled network element. *See* Statement of Commissioner Furchtgott-Roth, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket 96-98 (concurring in part and dissenting in part). The statute's only requirement is that an unbundled network element be used in "the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Section 251(c)(3) says nothing more about the uses to which a requesting carrier may put an unbundled network element, and no other provision in the 1996 Act authorizes the Commission to limit the ways in which a requesting carrier may use an incumbent's network elements.[1] Thus, a competitor may use *any* network element or combination of elements in *any* way it wishes, subject only to the requirement that the elements be used to provide "a telecommunications service."

[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 15679 [¶ 356] (1997) (hereinafter *Local Competition First Report and Order*).

The Commission is concerned that, without the restriction, the market for special access services will be undermined, because competitors will be able to offer combinations of network elements as a lower-priced substitute for incumbents' special access services. I believe that there are other ways that the Commission could have addressed this concern consistent with the statute. Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt revision of those rules, so that incumbent carriers are no longer required to include implicit subsidies in their prices for access services. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999). Pending a revision of these access charge requirements, the Commission could have implemented a temporary pricing mechanism that prevents new carriers from undercutting incumbent carriers' prices. *See Local Competition First Report & Order*, 11 FCC Rcd at 15864 [¶ 720] (permitting incumbents, for a limited period of time, to recover a percentage of carrier common line and transport interconnection charges for all interstate minutes traversing the incumbents' local switches for which the interconnecting carriers pay unbundled local switching element charges). Or it could have, in the *Third Report & Order*, decided against unbundling local transport. What the Commission may not legally do, however, is impose restrictions on the ways in which requesting carriers may use the network elements that they purchase from incumbents.

EXHIBIT MEW-2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket No. 96-98
Of the Telecommunications Act of 1996	)	
	)	
	)	
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SUPPLEMENTAL ORDER CLARIFICATION

Adopted: May 19, 2000 **Released:** June 2, 2000

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On November 5, 1999, we released the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* in this docket responding to the U.S. Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996 (1996 Act).[1] On November 24, 1999, we released a *Supplemental Order* that modified the *Third Report and Order and Fourth FNPRM* with regard to the ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*.[2] In this Order, we take three actions to extend and clarify the temporary constraint that we adopted in the *Supplemental Order*. First, we extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record for addressing the legal and policy disputes presented here. Second, we clarify what constitutes a "significant amount of local exchange service." Third, we clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 1 (1999) (citing *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)) (*Third Report and Order and Fourth FNPRM*).

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) (*Supplemental Order*).

significant local usage requirements.

II. BACKGROUND

2. In the *Third Report and Order*, we explained that incumbent LECs routinely provide the functional equivalent of combinations of unbundled loop and transport network elements (also referred to as the enhanced extended link) through their special access offerings. Because section 51.315(b) of the Commission's rules precludes the incumbent LECs from separating loop and transport elements that are currently combined, we stated that a requesting carrier could obtain these combinations at unbundled network element prices.[3] At the same time, we stated our concern that allowing requesting carriers to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service, could have significant policy ramifications because unbundled network elements are often priced lower than tariffed special access services. Because of concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges,[4] we agreed that we should further explore these considerations, recognizing that full implementation of access charge and universal service reform was still pending.[5]

3. The question of whether we should allow requesting carriers to use unbundled network elements to provide exchange access service to customers to whom the requesting carrier does not provide local exchange service has arisen in three contexts. First, in the *Local Competition Third Order on Reconsideration*, the Commission limited the obligation of incumbent LECs to provision shared transport as an unbundled network element to requesting carriers that provide local exchange service to a particular end user. It also sought comment on whether requesting carriers may use unbundled dedicated or shared transport facilities, in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.[6] Second, in the *Fourth FNPRM*, we asked parties to address the legal and policy issues associated with the ability of requesting carriers to obtain entrance facilities, which consist of a dedicated link from a carrier's point-of-presence to an incumbent LECs' serving wire center, as an unbundled network element.[7] We also asked that parties refresh the record in the *Local Competition Third Order on*

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3 *Third Report and Order*, 15 FCC Rcd at 3909, paras. 480-81 (citing 47 C.F.R. 51.315(b)).

4 *Id.* at 3912, para. 485 (citing Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Letter*)).

5 *Third Report and* Order, 15 FCC Rcd at 3912-13, paras. 485-89.

6 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12494-96, paras. 60-61 (1997) (*Local Competition Third Order on Reconsideration*).

7 *Fourth FNPRM*, 15 FCC Rcd at 3914-15, paras. 494-96.

Reconsideration.[8] Third, in the *Supplemental Order*, we expanded the scope of the *Fourth FNPRM* to seek comment on whether incumbent LECs could decline to provide carriers combinations of unbundled loop and transport network elements solely for the provision of exchange access service.[9]

4. A series of events since the Commission issued its *Local Competition First Report and Order*, culminating in the Supreme Court's decision in *AT&T v. Iowa Utilities Bd.*,[10] have shaped the issues associated with the ability of carriers to substitute unbundled network elements for tariffed special access services. Although the Commission found in the *Local Competition First Report and Order* that the Act does not permit incumbent LECs to place restrictions on the use of unbundled network elements,[11] it concluded that it was necessary to adopt a temporary mechanism to avoid a reduction in contributions to universal service prior to full implementation of access charge and universal service reform.[12] It therefore allowed incumbent LECs to recover access fees from purchasers of unbundled network elements until June 30, 1997.[13] Before this transition period expired, the Eighth Circuit stayed the Commission's unbundled network element pricing rules in October, 1996.[14] Once these rules were stayed, it became uncertain whether or

8 *Id.* at 3915, para. 496.

9 By limiting the ability of carriers to convert the entrance facility portion of special access service to unbundled network element pricing in the *Third Report and Order*, we believed that could sufficiently preserve the status quo while we examined the legal and policy ramifications of allowing requesting carriers to substitute unbundled network elements for special access service. We concluded subsequently in the *Supplemental Order* that we had underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and extended the temporary constraint to include combinations of unbundled loops and dedicated interoffice transport network elements. *Supplemental Order* at para. 4, n.5.

10 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. 721, 729-32, 736-38 (1999) (*Iowa Utils. Bd.*).

11 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15680, para. 359 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

12 *Local Competition First Report and Order*, 11 FCC Rcd at 15862-64, paras. 716-20.

13 *Id.* at 15864-66, para. 721-25. The Eighth Circuit Court of Appeals upheld the imposition of the temporary mechanism. *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997) (*CompTel v. FCC*).

14 *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423-26 (8th Cir. 1997). The Commission's pricing rules are based on forward-looking costs. *See Local Competition First Report and Order*, 11 FCC Rcd at 15844-62, paras. 672-715. The Eighth Circuit made final its determination that the Commission lacked authority under the 1996 Act to determine the rates involved in the implementation of the local competition provisions of the Act, including rates for access to unbundled network elements. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 793-796 (8th Cir. 1997).

not unbundled network elements would continue to be priced at forward-looking cost and whether there would be a significant difference between tariffed access rates and unbundled network element rates. Then, in 1997, the Eighth Circuit also vacated sections 51.315(b)-(f) of the Commission's rules, which protected the right of requesting carriers to obtain combinations of unbundled network elements, such as loop-transport combinations.[15] Vacatur of rule 51.315(b), in particular, precluded requesting carriers from obtaining access to such combinations without first incurring costly reconnection charges. In January 1999, the Supreme Court reinstated the Commission's pricing rules and rule 51.315(b).[16] At the same time, however, it ordered the Commission to revisit its implementation of section 251(d)(2), which addresses the circumstances in which incumbent LECs must make unbundled network elements available to requesting carriers.[17] We addressed this issue in the *Third Report and Order* and determined that incumbent LECs must unbundle loops and interoffice transport individually.[18] The *Fourth FNPRM* asks about the legal and policy implications of allowing requesting carriers to substitute combinations of unbundled loop and transport network elements for the incumbent LECs' tariffed special access service.

5. We took several steps in the *Supplemental Order* to ensure that we sufficiently preserved the status quo pertaining to the special access issue while the *Fourth FNPRM* remains pending. Specifically, we concluded that until resolution of the *Fourth FNPRM*, which we said would occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loop and transport network elements. We explained that this constraint does not apply if an IXC uses such combinations to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[19] In order to determine whether or not an IXC is using combinations of unbundled network elements to provide a significant amount of local exchange service, we stated that we would consider, for example, whether the IXC was providing at least one third of the customer's local traffic as described in a joint filing submitted by several parties.[20] In addition, we stated that we would presume that the requesting carrier is providing a significant amount of local exchange service if it

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15 *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813 (citing 47 C.F.R. § 51.315(b)-(f)).

16 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 736-38. The validity of rules 51.315(c)-(f), requiring incumbent LECs to combine network elements that are not currently combined, is again pending before the Eighth Circuit after the Commission asked the Court to reinstate the rules. *See Third Report and Order*, 15 FCC Rcd at 3907, para. 475.

17 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 733-36 (citing section 47 U.S.C. § 251(d)(2)).

18 *Third Report and Order*, 15 FCC Rcd at 3779-3787, 3842-3866, paras. 181-201, 321-79.

19 *Supplemental Order* at paras. 4-5.

20 *Id.* at n. 9 (citing Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999)) (*Bell Atlantic September 1999 Joint Letter*).

is providing all of the end user's local exchange service.[21]

6. In a joint filing submitted on February 28, 2000, several incumbent LECs and competitive LECs request that the Commission clarify the *Supplemental Order* regarding the minimum amount of local service a requesting carrier must provide in order to convert special access services to combinations of unbundled loop and dedicated transport network elements.[22] They propose certain changes to the *Bell Atlantic September 1999 Joint Letter* and request that the Commission modify the amount of local traffic considered "significant" in accordance with these changes.[23] The parties further request that the Commission allow limited auditing rights in order to ensure that requesting carriers meet the minimum threshold for purchasing combinations of unbundled loop and dedicated transport network elements.[24] Several parties responded to the *February 28, 2000 Joint Letter*. They argue generally that the use limitations on combinations that the incumbent LECs and competitive LECs propose are too restrictive, and will prevent requesting carriers from being able to use combinations of unbundled network elements to serve their customers.[25] We address these filings in this Order.

III. DISCUSSION

7. As we observed in the *Third Report and Order and Fourth FNPRM*, and as we

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[21] *Supplemental Order* at n.9.

[22] Letter from Gordon R. Evans, Vice President Federal Regulatory, Bell Atlantic; Robert T. Blau, Vice President Executive and Federal Regulatory Affairs, BellSouth; Richard Metzger, Vice President Regulatory and Public Policy, Focal Communications; Alan F. Ciamporcero, Vice President-Regulatory Affairs, GTE Service Corporation; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Priscilla Hill-Ardoin, Senior Vice President-Federal Regulatory, SBC Communications, Inc ; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom; Melissa Newman, Vice President-Regulatory Affairs, U.S. West, Inc.; Russell C. Merbeth, Vice President, Legal and Regulatory Affairs, WinStar Communications, Inc. to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98 (filed February 28, 2000) (*February 28, 2000 Joint Letter*).

[23] *February 28, 2000 Joint Letter* at 1-2.

[24] *Id.* at 3.

[25] Letter from Joseph Kahl, Director Regulatory Affairs, RCN Telecommunications Services; and other members of the Competitive Telecommunications Association (CompTel) to The Honorable William E. Kennard, Chairman, FCC, CC Docket No. 96-98 (filed March 13, 2000) (*Comptel March 13, 2000 Letter*); Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98 (filed March 10, 2000)(*MCI WorldCom March 10, 2000 Letter)*; Letter from Jonathan Askin, General Counsel, Association for Local Telecommunications Services (ALTS), CC Docket No. 96-98 (filed March 24, 2000) (*ALTS March 24, 2000 Letter*); Letter from Jonathan E. Canis, Counsel for Winstar Communications and e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Mar. 29, 2000); Letter from Douglas G. Bonner, Counsel for VoiceStream Wireless Corporation, Daniel Waggoner, Counsel for AT&T Wireless Corporation, Mary Davis, Esq., Manager-External Affairs, United States Cellular Corporation, to The Honorable William E. Kennard, Chairman, and Commissioners, FCC, CC Docket No. 96-98 (filed Apr. 12, 2000); Letter from Ross A. Buntrock, Counsel for e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 19, 2000).

reaffirmed in the *Supplemental Order*, permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service.[26] For example, in the absence of completed implementation of access charge reform, allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale.[27] In the words of one incumbent LEC, this would amount to a "roundabout termination" of the access charge regime, prior to the actual elimination of the implicit universal service subsidies contained in access charges, and would require it to bear the expense of providing local dialtone service without a viable means of recovering the costs of universal service.[28] We therefore invoked our longstanding authority to adopt temporary measures designed to protect universal service and prevent industry instability during periods of regulatory transition.[29]

8. Although we have recently taken significant steps in implementing access charge reform,[30] a number of additional considerations, discussed below, require us to extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record in the *Fourth FNPRM* for addressing the legal and policy issues that have been raised. Therefore, until we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[31] We emphasize that by issuing this clarification order, we do not decide any of the substantive issues in the *Fourth FNPRM* on the merits.

9. We previously asked commenters to discuss the source and extent of any right of incumbent LECs to withhold unbundled network elements from carriers seeking to use such elements solely for the purpose of providing special access services.[32] As discussed below,

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26 *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd at 3912, 3913, paras. 485, 489; *Supplemental Order* at 7.

27 *See BellSouth Aug. 9, 1999 Letter* at 3-7; Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9. The comments and reply comments cited in this order refer to the filings parties submitted in response to the *Fourth FNPRM* on January 19, 2000 and February 18, 2000.

28 *BellSouth Aug. 9, 1999 Letter* at 6.

29 *See Fourth FNPRM*, 15 FCC Rcd at 3914, para. 492 (citing *CompTel v. FCC*, 117 F.3d at 1073-75); *see also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984); *Supplemental Order* at para. 4, n 5.

30 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000).

31 *Supplemental Order* at para. 4. This temporary constraint does not apply to stand-alone loops. *See Third Report and Order*, 15 FCC Rcd at 3777, para. 177.

32 *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

several commenters argue that such a right follows from the "impair" standard of section 251(d)(2), which directs the Commission to order the unbundling of network elements only after "consider[ing], at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[33] In 1999, the Supreme Court rejected our prior rules implementing that provision and directed us to give greater effect to the "impair" standard.[34]

10. In response to our inquiry in the *Fourth FNPRM*, the incumbent LECs argue that, in reexamining our implementation of section 251(d)(2), we must conduct a more market-specific analysis in deciding when network elements must be unbundled.[35] They contend that, in some contexts, denial of particular elements in the incumbent's network may impair the ability of other carriers to provide services in one market but not in another. In those circumstances, the incumbents argue, the availability of such elements should be restricted to the carriers that intend to use them -- substantially, though not necessarily exclusively -- in the markets in which the "impair" standard is met. Here, the incumbents contend, denial of access to the loop-transport combinations at issue would not "impair" a carrier's ability to provide services in the special access market or, more generally, in the exchange access market, of which the special access market is a subset.[36] Thus, the incumbents conclude, competitors have no statutory right to obtain access to such combinations for purposes of competing only in that market, even though the Commission has found that denial of access to those combinations would impair a carrier's ability to compete in the separate market for ubiquitous local exchange and xDSL services.[37]

11. Other commenters, by contrast, contend that "[t]he Section 251(d)(2) determination must . . . be made available on a *network element-by-network element* basis."[38] Those commenters argue that if certain elements satisfy the "impair" standard with respect to *one* market, a carrier may automatically obtain access to those elements solely for purposes of competing in *other* markets, without using the elements to compete in the market that was the basis of the "impair" analysis.[39]

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33 47 U.S.C. 251(d)(2)(B).

34 *Iowa Utils. Bd. v. FCC*, 119 S.Ct. at 733-36.

35 *See, e.g.*, Bell Atlantic Comments at 13-16; BellSouth Comments at 22-29; SBC Comments at 6-10; US West Comments at 2-12.

36 Special access service employs dedicated, high-capacity facilities that run directly between the end user, usually a large business customer, and the IXC's point-of-presence. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, para. 8 (rel. Aug. 27, 1999) (*1999 Access Charge Reform Order*); US West Comments at 8-9.

37 *See, e.g.*, SBC Comments at 7; Bell Atlantic Comments at 18-19.

38 AT&T Reply Comments at 11 (emphasis in original).

39 *Id.* at 9-12; *see also* MCI WorldCom Reply Comments at 3-6.

12. Before the Supreme Court issued its decision in *Iowa Utilities Board*, we sometimes approached an incumbent's obligation to unbundle network elements as though it were an all-or-nothing proposition, suggesting that, if a competitor were entitled to obtain access to an element for one purpose, it was generally also entitled to obtain access to that element for wholly different purposes as well.[40] At that time, however, we never specifically focused on the relationship between that issue (particularly as it relates to this special access dispute) and the "impair" standard of section 251(d)(2). Now that the Supreme Court has rejected our previous interpretation of that provision as insufficiently rigorous, it is appropriate for us to revisit the issue.

13. In the *Third Report and Order*, we conducted a general "impair" analysis of loops and dedicated transport and ordered those elements to be unbundled.[41] That analysis did not fully focus, however, on application of the "impair" standard to the exchange access market, with the limited exception of entrance facilities.[42] With regard to entrance facilities, we determined that there was insufficient record evidence for us to find that requesting carriers had effective alternatives in the market to allow them to provide service.[43] We sought additional evidence in the *Fourth FNPRM* on whether there was any basis in the statute or our rules, including the "impair" standard, under which the incumbent LECs could decline to provide entrance facilities at unbundled network element prices, and we later modified this inquiry in the *Supplemental Order* to include loop-transport combinations.[44]

14. The exchange access market occupies a different legal category from the market for telephone exchange services; indeed, at the highest level of generality, Congress itself drew an explicit statutory distinction between those two markets.[45] Even though the exchange access market is legally distinct from the local exchange market, we must determine whether the markets are otherwise interrelated from an economic and technological perspective, such that a finding that a network element meets the "impair" standard for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access market. Unless we find that these markets are inextricably interrelated in these other respects, it is unlikely that Congress intended to compel us, once we determine that a network element meets the "impair" standard for the local exchange market, to grant competitors access — for that

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40 *See generally Third Report & Order*, 15 FCC Rcd at 3911-12, para. 484 (discussing prior Commission orders); *but see id.* at para. 81 (finding that section 251(d)(2)(B) permits consideration of "the particular types of customers that the carrier seeks to serve"); SBC Comments at 8-9 (characterizing the Commission's limitation on access to circuit switches in the *Third Report & Order* as a use restriction).

41 *Third Report and Order*, 15 FCC Rcd at 3779-82, 3846-3852, paras. 182-189, 332-348.

42 *Id.* at 3852, para. 348.

43 *Id.*

44 *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

45 *See, e.g.*, 47 U.S.C. 153(16) (defining "exchange access"); 153(47) (defining "telephone exchange service").

reason alone, and without further inquiry — to that same network element solely or primarily for use in the exchange access market.

15. Contrary to the views of some commenters,[46] section 251(d)(2) does not compel us, once we determine that any network element meets the "impair" standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market. That provision asks whether denial of access to network elements "would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer.*"[47] Although ambiguous, that language is reasonably construed to mean that we may consider the markets in which a competitor "seeks to offer" services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services. We adopted a similar approach in the *Third Report and Order*, observing that, because "Section 251(d)(2)(B) requires us to consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer," it is "appropriate for us to consider the particular types of customers that the carrier seeks to serve."[48] In any event, even if section 251(d)(2) were altogether silent on this issue, that provision directs us to consider the substantive criteria of subparagraphs (A) and (B) "at a minimum." As we have previously determined, that language authorizes us, at our discretion, to consider other factors in addition to those explicitly designated criteria, such as the development of facilities-based competition.[49] Here, the statute plainly entitles us to ask, as part of our inquiry into whether network elements should be made available for the sole or primary purpose of providing exchange access services, whether denying competitors access to that combination would in fact impair their ability to provide those services.[50]

16. Our identification of the network elements that "should be made available" for purposes of section 251(d)(2) is an ongoing exercise in legislative rulemaking authority. The

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[46] *See, e.g.*, AT&T Reply Comments at 9-12.

[47] 47 U.S.C. 251(d)(2)(B) (emphasis added). Along similar lines, Rule 309(a), which we promulgated in 1996, addresses limitations on the use of network elements "that would *impair* the ability of a requesting telecommunications carrier" to offer particular services. 47 C.F.R. 51.309(a) (emphasis added).

[48] *Third Report and Order*, 15 FCC Rcd at 3737-38, para. 81 (emphasis in original).

[49] *See id.* at 3745-50, paras. 101-16.

[50] AT&T alternatively argues that section 251(c)(3) overrides any suggestion in section 251(d)(2) that we may conduct a market-specific analysis in making our unbundling determinations. AT&T Reply Comments at 10-12. We disagree. Section 251(c)(3) does not speak directly to whether a market-specific analysis is appropriate in determining whether carriers may obtain access to particular elements, and it could therefore pose no conflict with an otherwise proper implementation of section 251(d)(2). Moreover, as the Supreme Court held in *Iowa Utilities Board*, section 251(c)(3) does not itself create "some underlying duty" to "provide all network elements for which it is technically feasible to provide access." 119 S.Ct. at 736. Instead, it is section 251(d)(2) that directs the Commission to issue legislative rules imposing unbundling obligations on incumbent LECs, and that provision permits the Commission to consider criteria that include "the services that [the requesting carrier] seeks to offer."

inquiry we conduct in discharging that authority is necessarily empirical and dynamic. As we emphasized in the *Third Report and Order*, we properly look to actual developments in the telecommunications marketplace before imposing additional unbundling obligations on incumbent LECs; we generally do not impose such obligations first and conduct our "impair" inquiry afterwards.[51] Here, we must gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the *Third Report and Order* before we can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services. One of our tasks will be to resolve a key empirical dispute: whether the markets for local exchange service and special access are so closely interrelated from an economic and technological perspective that a showing of impairment with respect to the former market would by itself tend to suggest, as a practical matter, that the "impair" standard is satisfied with respect to the latter market.[52]

17. Our new unbundling rules, issued in the wake of *Iowa Utilities Board*, should significantly increase competition in local markets by removing long-standing uncertainty about the scope of the incumbent LECs' unbundling obligations and by stimulating new investment. We must take the market effects of those new rules into account as we conduct our "impair" analysis for special access service, and we must therefore allow a meaningful period of time to elapse from the date on which those new rules became effective.[53] We will issue a Public Notice in early 2001 to gather evidence on this issue so that we may then resolve it expeditiously. In addition, the Commission and the parties need more time to evaluate the issues raised in the record in the *Fourth FNPRM*. For example, the incumbent LECs have produced complex economic analyses of the effect on the marketplace of permitting requesting carriers to convert existing special access services to combinations of unbundled network elements.[54] At least one party has argued that, in order to respond, it needs more information concerning the assumptions and calculations underlying the analysis.[55]

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51 *See Third Report and Order*, 15 FCC Rcd at 3712, para. 21 ("In considering whether to unbundle a particular network element, we look first to what is occurring in the marketplace today.").

52 *See* AT&T Reply Comments at 15-19 (arguing that the facilities that competitive LECs use to provide special access are no different from the facilities they use to provide other services, and that thus, there is no basis to treat competitive LECs' use of these elements to provide special access service differently from the use of the same facilities to provide other telecommunications services); MCI WorldCom Reply Comments at 7-10 (arguing that if there are insufficient lines from some incumbent LEC serving wire centers to IXC points-of-presence (POPs) such that competitive LECs are impaired without access to these lines to provide the "services they seek to offer," then it follows that there are insufficient lines from some serving wire centers to IXC POPs such that they are also impaired in their ability to provide access services). *Contra* SBC Comments at 10-12 (arguing that the traditional special access/private line market is distinct from transport generally because competitive carriers have deployed fiber to specifically provide these services).

53 While most of the unbundling rules that we adopted in the *Third Report and Order* became effective on February 17, 2000, certain requirements in the rules did not become effective until May 17, 2000. 65 Fed. Reg. 2542 (Jan. 18, 2000).

54 *See* USTA Comments, Special Access Fact Report, Jan. 19, 2000.

55 *See* MCI WorldCom Comments at 26-29.

18. Our extension of this temporary constraint is necessary for an independent reason as well. An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers.[56] Competitive access, which originated in the mid-1980s, is a mature source of competition in telecommunications markets.[57] We are reluctant to adopt a flashcut approach with potentially severe consequences for the competitive access market without first permitting the development of a fuller record.

19. Contrary to the concerns of some parties,[58] the temporary constraint at issue here should not allow incumbent LECs that provide in-region long distance service to engage in "price squeezes" or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and non-discrimination requirements. For example, Congress anticipated that some Bell Operating Companies ("BOCs") would obtain authorization under 47 U.S.C. 271 to originate in-region long-distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long-distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.[59]

20. As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXCs or

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[56] *See* Time Warner Telecom Comments at 19.

[57] The Commission has observed competition develop in the special access market and has taken steps to increase the incumbent LECs' pricing flexibility and ability to respond to the advent of such competition. *1999 Access Charge Reform Order* at para. 14 (citing *Special Access Expanded Interconnection Order*, CC Docket Nos. 91-141 and 92-333, Report and Order, 7 FCC Rcd 7369 (1992) (subsequent citations omitted). *See also Third Report and Order*, 15 FCC Rcd at 3852, para. 348 (discussing alternatives to unbundled transport for certain point-to-point routes).

[58] *See* MCI WorldCom Comments at 16; TRA Comments at 9.

[59] *See* 47 U.S.C. 272(e)(3). In the *Accounting Safeguards Order*, the Commission determined that, "where a BOC charges different rates to different unaffiliated carriers for access to its telephone exchange service, the BOC must impute to its integrated operations the highest rate paid for such access by unaffiliated carriers." *Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd at 17539, 17577, para. 87 (1996). *See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as* amended, CC Docket No. 96-149, Report and Order, 11 FCC Rcd 21905, 22028-30, paras. 256-58 (1996) (implementing section 272(e)(3)).

by improperly allocating costs or assets between itself and its long-distance affiliate.[60] Indeed, those "separation requirements have been in place for over ten years, and independent (non-BOC) incumbent LECs have been providing in-region, interexchange services on a separated basis with no substantiated complaints of a price squeeze."[61] Moreover, because the interim constraint at issue is merely temporary, we will of course be free to take into account any claims of unfair competition when we adopt permanent rules addressing the unbundling issue presented here.

21. To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the *Fourth FNPRM*, we now define more precisely the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations. We recognize that making a determination about what constitutes a significant amount of local usage on a facility is not an exact science. We believe, however, that the incumbent LECs and competitive LECs that submitted the *February 28, 2000 Joint Letter* have presented a reasonable compromise proposal under which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service. The local usage options we adopt below thus provide a safe harbor that allows the Commission to preserve the status quo while it examines the issues in the *Fourth FNPRM* in more detail, while still allowing carriers to use combinations of unbundled loop and transport network elements to provide local exchange service.

22. We find that a requesting carrier is providing a "significant amount of local exchange service" to a particular customer if it meets one of three circumstances:

(1) As we found in the *Supplemental Order*, the requesting carrier certifies that it is the exclusive provider of an end user's local exchange service.[62] The loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, the requesting carrier is the end user's only local service provider, and thus, is providing more than a significant amount of local exchange service. The carrier can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or

(2) The requesting carrier certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local

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60 *E.g.*, Access *Charge Reform*; *Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, First Report and Order, 12 FCC Rcd 15982, 16101-04, paras. 277-82 (1997).

61 *Id.* at 16101, para. 279.

62 *Supplemental Order* at n.9.

dialtone lines; and for DS1 circuits and above,[63] at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually,[64] and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level),[65] each of the individual DS1 circuits must meet this criteria. The loop-transport combination must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, a carrier's provision of at least one third of an end user's local traffic is significant because it indicates that the carrier is providing more than a de minimis amount, but less than all, of the end user's local service. As we stated above, we find this to be a reasonable indication that the requesting carrier has taken affirmative steps to provide local exchange service to the end user, and is not using the facilities solely to bypass special access service. Such a carrier may then use unbundled loop-transport combinations to serve the customer as long as the active channels on the facility, and the entire facility, are being used to provide the amount of local exchange service specified in this option, thereby offering the carrier some flexibility to use the combinations to provide other services besides local exchange service; or

(3) The requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic. When a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criteria. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, collocation is not required. The requesting carrier does not need to provide a defined portion of the end user's local service, but the active channels on any loop-transport combination, and the entire facility, must carry the amount of local exchange traffic specified in this option. This option may be the most efficient for requesting carriers that provide high capacity facilities to large end users that carry a significant amount of local voice traffic, but that represent only a small

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63 A DS1 circuit contains 24 voice-grade channels.

64 Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC. This is consistent with the Commission's statement in the *Local Competition First Report and Order* that state commissions have the authority to determine what geographic areas should be considered "local areas" for purposes of applying reciprocal compensation arrangements, consistent with their historical practice of defining local service areas for local exchange carriers. *Local Competition First Report and Order*, 11 FCC Rcd at 16013, para. 1035.

65 A DS3 circuit contains 24 DS1s. A DS1 circuit that is multiplexed to the DS3 level passes through electronic equipment that allows the signals carried on the DS1 to be consolidated on to the DS3.

portion of the end user's total local exchange service. This option recognizes that although the requesting carrier is not providing one-third of the end user's local voice service, as set forth in option 2, the carrier has still taken affirmative steps to provide local service to the customer, and is not using the circuits simply to bypass special access. As the record indicates, while such a carrier may not be providing a significant amount of the customer's total local service, the 50 percent facility threshold indicates that a significant portion of the service that the carrier does provide to the end user is local.[66]

23. We clarify that the three alternative circumstances described above represent a safe harbor for determining the minimum amount of local exchange service that a requesting carrier must provide in order for it to be deemed "significant." We acknowledge that there may be extraordinary circumstances under which a requesting carrier is providing a significant amount of local exchange service but does not qualify under any of the three options. In such a case, the requesting carrier may always petition the Commission for a waiver of the safe harbor requirements under our existing rules.[67]

24. We find that the limited collocation requirements contained in local usage options 1 and 2 are reasonable. They are consistent with both the *Third Report and Order*, in which we stated that any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements,[68] and with the *Supplemental Order*, in which we referred to a requesting carrier's provision of local exchange service terminating at a collocation arrangement as an example of significant local usage.[69] We also stated in the *Third Report and Order* that the Commission expected that it would be most efficient for the incumbent LEC to connect unbundled loop-transport combinations directly to a requesting carrier's collocation cage.[70] Finally, the collocation requirements contained in options 1 and 2 should not impose an undue burden on requesting carriers because they require only that the circuit that the requesting carrier seeks to convert terminate at a single collocation arrangement in the incumbent LEC's network.[71]

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66 Letter from Susanne A. Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 11, 2000) (*Bell Atlantic Apr. 11, 2000 Letter*).

67 47 C.F.R. § 1.3.

68 *Third Report and Order*, 15 FCC Rcd at 3912, para. 486

69 *Supplemental Order* at n.9.

70 *See Third Report and Order*, 15 FCC Rcd at 3831, para. 298.

71 *See February 28, 2000 Joint Letter* at 2 (stating in options 1 and 2 that "the loop/transport combination originates at a customer's premises and terminates at the telecommunications carrier's collocation arrangement."); Letter from Melissa Newman, Vice President – Federal Regulatory, US West, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 2 (filed Apr. 13, 2000) (*US West Apr. 13, 2000 Letter*) ("US (continued....)

25. We do not adopt MCI WorldCom's proposal that incumbent LECs should presume that any circuit that a requesting carrier connects to a port on a "Class 5" switch or its equivalent is used exclusively to provide local service.[72] There is no basis to assume that every circuit that terminates in a certain type of switch is being used exclusively for local traffic, and for circuits that are multiplexed into larger capacity facilities, which are often the circuits that carriers seek to convert to unbundled loop-transport combinations, there may be no way to determine whether an individual line actually terminates into a particular switch.[73] We also do not believe that we should regulate the type of equipment that a carrier must use while the temporary constraint is in effect.

26. We also do not adopt MCI WorldCom's proposal that we deem a circuit carrying at least ten percent local traffic to be carrying a significant amount of local traffic. It argues that this approach is consistent with the Commission's rules under which the revenues and costs generated by a special access circuit carrying at least ten percent interstate traffic are classified as "interstate."[74] As the Commission has stated, the amount of interstate traffic carried on a circuit is deemed to be de minimis if it amounts to ten percent or less of the total traffic on a special access line.[75] Because the Commission has found the ten percent threshold to represent a de minimis, not a significant, amount of traffic, we will not use this rule to determine significant local usage.

27. We do not adopt CompTel's proposal for significant local usage under which requesting carriers would be able to request wholesale conversions of special access circuits if (a) the carrier is certified as a competitive LEC and reports that at least 70 percent of its revenues reported to the Universal Service Fund Administrator are local, or (b) the special access arrangements are used to provide services that are "priced to attract (and are capable of completing) the customer's local usage," or (c) the carrier certifies that the special access arrangements are used for the completion of local calls, or (d) the special access arrangements are

(Continued from previous page)
West also emphasized that the collocation requirement is not burdensome because a requesting carrier only needs one collocation arrangement per switch it places in service").

[72] *MCI WorldCom Mar. 22, 2000 Letter* at 9. Some carriers use circuit switches with a "Class 5" designation to provide local exchange service.

[73] *See Bell Atlantic Apr. 11, 2000 Letter*, Attachment at 3.

[74] Letter from Chuck Goldfarb, Director Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 9-10 (filed Apr. 4, 2000) (*MCI WorldCom Apr. 4, 2000 Letter*). MCI WorldCom proposed subsequently that we find that a requesting carrier is providing a significant amount of local exchange service if 25 percent or more of the activated channels on a DS-1 facility are used for local service. It based this proposal on an analysis of the costs and benefits associated with a requesting carrier converting some of the DS-0 channels on a DS-1 circuit to local usage. Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 28, 2000). This proposal appears highly dependent on a carrier's individual costs and does not enable the Commission to verify that a requesting carrier is providing a significant amount of local exchange service to a particular end user.

[75] *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, 5660-61 (1989).

used to provide data services.[76] It also argues that incumbent LECs that provide interexchange services in a certain market must make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user.[77] We reject these proposals because they offer no way to verify whether a requesting carrier is providing any specified amount of local service. In addition, its proposal to allow unconstrained use of unbundled loop-transport combinations in markets in which the incumbent LEC provides interexchange service does not allow us to preserve the status quo while we consider the issues in the *Fourth FNPRM*. Instead, the three options described above provide a reasonable threshold for determining whether a carrier has taken affirmative steps to provide local service. They are also verifiable for both the requesting carrier and the incumbent LEC and prevent parties from gaming implementation of the interim requirements. While CompTel expresses a concern about incumbent LECs being both an input supplier and a retail competitor in the interexchange market, the temporary constraint, as we explain above, should not allow incumbent LECs that provide in-region long distance service to engage in anticompetitive behavior.[78]

28. We further reject the suggestion that we eliminate the prohibition on "co-mingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.[79] We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.

29. We clarify that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements.[80] We do not believe it is necessary to address the precise form that such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a

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[76] With regard to data services, we note that the local usage options we adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, as long as it meets the thresholds contained in the options.

[77] Letter from Jonathan D. Lee, Vice President, Regulatory Affairs, CompTel, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 27, 2000) (*CompTel Apr. 27, 2000 Letter*). Sprint supports CompTel's proposal except for the requirement that incumbent LECs that provide interexchange services in a certain market make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user. Letter from Richard Juhnke, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 1 (filed May 2, 2000).

[78] *CompTel Apr. 27, 2000 Letter* at 2.

[79] *See MCI WorldCom Apr. 4, 2000 Letter* at 6-8; *February 28, 2000 Joint Letter* at 2.

[80] *See Supplemental Order* at n.9.

requesting carrier is a practical method of certification.[81] The letter should indicate under what local usage option the requesting carrier seeks to qualify. In order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. We stated in the *Supplemental Order* that we did not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport network elements was so limited in duration.[82] Because we are extending the temporary constraint, we find that it is reasonable to allow the incumbent LECs to conduct limited audits.

30. We agree with ALTS that once a requesting carrier certifies that it is providing a significant amount of local exchange service, the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay.[83] We stated in the *Third Report and Order* that incumbent LECs and requesting carriers have developed routine provisioning procedures that can be used to deploy unbundled loop-transport combinations using the Access Service Request process, a process that carriers have used historically to provision access circuits.[84] Under this process, the conversion should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested. We continue to believe that the Access Service Request process will allow requesting carriers to avoid material provisioning delays and unnecessary costs to integrate unbundled loop-transport combinations into their networks, and expect that carriers will use this process for conversions.

31. We agree with MCI WorldCom that upon receiving a conversion request that indicates that the circuits involved meet one of the three thresholds for significant local usage that the incumbent LEC should immediately process the conversion.[85] We emphasize that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.[86] There is broad agreement

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81 *See ALTS March 24, 2000 Letter* at 13.

82 *See Supplemental Order* at n.9

83 *ALTS March 24, 2000 Letter* at 13.

84 *See Third Report and Order*, 15 FCC Rcd at 3831, para. 298, n.581. ALTS states that the Access Service Request process has been adopted by industry consensus in New York. *ALTS March 24, 2000 Letter* at 13.

85 *MCI WorldCom Apr. 4, 2000 Letter* at 9.

86 The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. *February 28, 2000 Joint Letter* at 3. We agree that this should be the only time that an incumbent LEC should request an audit.

among the incumbent LECs and the competitive LECs on auditing procedures. In particular, parties agree that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options.[87] In order to reduce the burden on requesting carriers, we find that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements that it will conduct an audit, and may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance. We agree with Bell Atlantic that at the same time that an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission.[88] While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

32. We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. For example, US West points out that records that demonstrate that a requesting carrier's unbundled loop-transport combination is configured to provide local exchange service should be adequate to support the carrier's certification without the need for extensive call detail records.[89] We emphasize that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business. We will not require specifically that incumbent LECs and requesting carriers follow the other auditing guidelines contained in the *February 28, 2000 Joint Letter*. As the parties indicate, in many cases, their interconnection agreements already contain audit rights.[90] We do not believe that we should restrict parties from relying on these agreements.

33. We note that the requirements in this order will take effect immediately upon publication in the Federal Register. We find good cause for doing so because they will allow incumbent LECs to promptly process requests from requesting carriers for access to unbundled loop-transport combinations, and provide the industry with more clearly defined standards for using combinations during the interim period prior to our resolution of the *Fourth FNPRM*.

IV. PROCEDURAL ISSUES: FINAL REGULATORY FLEXIBILITY CERTIFICATION

34. The Regulatory Flexibility Act (RFA)[91] requires that regulatory flexibility analyses

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87 *See, e.g., February 28, 2000 Joint Letter* at 3; *ALTS March 24, 2000 Letter* at 12; *MCI WorldCom Apr. 4, 2000 Letter* at 10.

88 *Bell Atlantic Apr. 11, 2000 Letter* at 3.

89 *US West Apr. 13, 2000 Letter* at 1.

90 *February 28, 2000 Joint Letter* at 3.

91 The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." See 5 U.S.C. § 605(b). The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." See 5 U.S.C. § 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. See 5 U.S.C. § 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). See 15 U.S.C. § 632. SBA rules provide that for establishments providing "Telephone Communications Except Radiotelephone," which is Standard Industrial Classification (SIC) Code 4813, a small entity is one employing no more than 1,500 persons.

35. This Clarification of the *Supplemental Order* in CC Docket No. 96-98 (Clarification Order) sets out the criteria under which a requesting carrier may use combinations of unbundled network elements to provide exchange access services. The criteria is consistent with several of the Commission's findings in the *Supplemental Order*.[92] It also extends the date by which the Commission will resolve its *Fourth FNPRM* from June 30, 2000. Until resolution of the *Fourth FNPRM*, IXCs are prohibited from converting special access services that they purchase from the Bell Operating Companies or other incumbent local exchange carriers to combinations of unbundled loops and transport network elements unless they meet the designated criteria. This clarification therefore pertains directly to IXCs, and indirectly to Bell Operating Companies (BOCs), other incumbent local exchange carriers, competitive local exchange carriers, and competitive access providers.

36. We certify that this clarification of the *Supplemental Order* will not have a significant economic impact on a substantial number of small entities because it maintains the status quo regarding the ability of IXCs to purchase special access services for a longer period of time. It also maintains the status quo for any small incumbent local exchange carriers from which interexchange carriers purchase special access services. The Clarification Order also allows some limited auditing by incumbent local exchange carriers to determine whether IXCs that use combinations of unbundled network elements meet the established criteria in the Order. This limited auditing will not have a significant economic impact on a substantial number of small entities because any incumbent LEC that chooses to voluntarily exercise its limited auditing rights will bear all expenses associated with any resulting audit. The Commission has also required that audits be conducted based on the records that a small carrier keeps in the normal course of business. The Commission will send a copy of the Clarification Order, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Clarification Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. See 5 U.S.C. § 605(b).

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92 *Supplemental Order* at n.9.

V. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1,3,4,201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission clarifies the *Supplemental Order* as set out above.

38. IT IS FURTHER ORDERED that the requirements in this order will become effective immediately upon publication in the Federal Register.

39. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Supplemental Order Clarification, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

In his dissenting statement, Commissioner Furchtgott-Roth has suggested that there is a close linkage between questions in this docket and those in a docket considering reform of universal service and interstate access charges.[1] The dissenting statement suggests, incorrectly, that the public has been unaware of any overlapping policy considerations that may exist among the issues in the two dockets, and he has concluded that the public "had no opportunity to comment meaningfully on this issue." I concur in the observation that certain policy considerations are relevant to both dockets. Where I disagree with the dissent is in his perception that the public was unaware of any commonality of policy issues between the dockets. I further disagree with the suggestion that the determination to defer final resolution of the matters in the instant docket was somehow tainted by consideration of policy questions common to both proceedings.

First, the Commission's Local Competition Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FNPRM) in this docket advised the public, very directly, that allowing requesting carriers to use unbundled network elements solely to provide exchange access service would have significant policy ramifications.[2] The Commission stated in those decisions that our determinations regarding the substitution of combinations of unbundled network elements for special access service could significantly reduce the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform.[3] In seeking comment on the policy implications that such a significant reduction would cause, the Commission expressly cited our access charge reform proceeding and noted the relationship between that proceeding and universal service concerns.[4]

The overlapping policy considerations between the two dockets was not lost upon commenters. In fact, MCI expressly requested that its comments addressing the CALLS proposal be made part of the record in this docket, initiated by the Fourth FNPRM, emphasizing that the public should be able to comment on the connection between the special access and CALLS issues.[5] We agreed, and those comments are contained in the

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1 *Access Charge Reform; Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Notice of Proposed Rulemaking (rel. Sept. 15, 1999).

2 *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd at 3912-15, paras. 485, 489, 494-96.

3 *Id.* at 3913, 3915, paras. 489, 496.

4 *Id.* at 3915, para. 496 & n.994.

5 Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 5-7 (filed Apr. 6, 2000).

record of both proceedings. It is therefore not surprising that, in the record in this docket, several commenters argued that allowing carriers to substitute combinations of unbundled network elements for special access service could affect the ability of the CALLS plan to reform access charges in a predictable, efficient manner.[6] Recognizing the link between special access and switched access, commenters also expressed concern that allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing carriers to abandon switched access for unbundled network element-based special access.[7] In short, there is no merit to the suggestion that the public was ignorant of the policy considerations common to both dockets.

Finally, I reject Commissioner Furchtgott-Roth's passing suggestion that the CALLS proceedings have improperly "tainted" the Commission's proceedings in this docket. The Order we release today speaks for itself, and it rests on several explicit legal grounds. The most prominent of those is our determination that, in considering whether loop-transport combinations meet the "impairment" standard with respect to the exchange access market, we should first take into account the market effects of the comprehensive unbundling rules that we adopted last fall and that did not become effective until this year. Commissioner Furchtgott-Roth barely addresses our "impairment" analysis on the merits, even though that analysis amply justifies our decision to extend the interim constraint at issue, quite apart from additional concerns about the massive industry dislocations that could result from an immediate lifting of that constraint. I am happy to rest on the reasoning set forth in the Order, and, in the proceedings that follow, I encourage all interested parties to help us fine-tune our implementation of Section 251(d)(2) in the wake of the Supreme Court's decision in *Iowa Utils. Bd. v. FCC*.[8]

Commissioner Furchtgott-Roth apparently expects the Bureau and this Commission to put blinders on and ignore policy considerations that may be relevant to both dockets. While it is true that blinders can help a horse race faster by shielding distractions from its view, we need to see the entire landscape to get to where we want to be. This isn't a race. Time helps, not hurts, our thinking here.

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6 GTE Comments at 20-22; GTE Reply Comments at 13-14; National Exchange Carrier Association, Inc., National Rural Telecom Association, National Telephone Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies Joint Reply Comments at 7; Cf. Sprint Reply Comments at 9-10.

7 *See, e.g.* Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9.

8 119 S. Ct. 721 (1999).

Separate Statement of
Commissioner Susan Ness

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification (CC Docket No. 96-98)

I support the steps we have taken to clarify further the interim requirement that a carrier provide a significant amount of local service in order to convert special access services to unbundled network elements. This clarification should reduce disputes by providing a safe harbor for carriers to satisfy this interim requirement. Some carriers however, have indicated that there may be situations in which a carrier is providing a significant amount of local service, but does not fit within any of the safe harbors in this order. As we state in this order, such carriers may petition the Commission for a waiver. Given that this is an interim rule, I would have preferred to adopt a more streamlined waiver process, enabling the Commission to rule on any waiver requests within a short period of time. Nonetheless, I would urge the Commission to act on any such requests as expeditiously as possible.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

This order is procedurally and substantively at odds with the law that Congress has directed this agency to follow. My chief criticism of this decision is that it, like the recently initiated depreciation waiver proceeding, is an integral – but unacknowledged – part of the deal that was struck between the Commission and a select group of parties to the "CALLS negotiations" that were held in January and February of this year. Contrary to Chairman Kennard's separate statement, I do not dispute that there may be "policy considerations" relevant to both dockets. Rather, I object to the Commission's allowing the outcome in this proceeding to become a bargaining chip in what was publicly advertised as an entirely separate proceeding.

This Order Is Illegitimately Linked to the CALLS Negotiations. This order – like the Further Notice of Proposed Rulemaking that the Commission recently issued regarding incumbent local exchange carriers' requests for waivers from this agency's depreciation requirements[1] – is essentially an outgrowth of negotiations between the Commission, acting chiefly through the Common Carrier Bureau, and the Coalition for Affordable Local and Long Distance Service ("CALLS"). A brief description is in order. Last summer, the Coalition submitted to the Commission a proposal for reforming universal service and interstate access charges, and the Commission sought comment on this proposal. *See* Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999).

Rather than simply render a decision on the CALLS proposal based on comments submitted by interested parties, the Commission instead set itself up as a sort of referee of negotiations between a small, select group of some – but by no means all – of the parties with interests in this proceeding, including the members of the Coalition and groups purporting to represent consumer interests. In the early part of this year, a series of meetings between these parties and the Bureau were held. The substance of what was discussed at these meetings was not made

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[1] Further Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review -- Review Of Depreciation Requirements For Incumbent Local Exchange Carriers, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et al.*, CC Docket Nos. 98-137, 99-117 (Rel. Apr. 3, 2000).

public, nor were a number of parties with interests in the outcome of this proceeding (including the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, and the Association for Local Telecommunications Services) allowed to participate in these discussions. Although the Commission could legally have attempted to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq.*,[2] it ignored that statute completely.

At some point in this process, proceedings in separate dockets, unrelated to the issue of switched access charge reform, became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters – one relating to the Commission's depreciation requirements and this special access proceeding – would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these separate matters. The Bureau agreed to recommend to the Commission that it approve the incumbents' applications for a modification to the depreciation waiver requirements and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that the Commission "clarify" the existing rules regarding special access and defer further rulemaking until 2001.

The linkage between the depreciation and special access items was utterly clear – at least internally. Indeed, to brief the Commissioners and their staff on the outcome of the CALLS negotiations, the Bureau distributed briefing sheets describing different aspects of the CALLS deal, two of which were entitled "CALLS – Depreciation" and "CALLS – Special Access." The special access briefing sheet stated that the special access rulemaking posed particular financial problems for the ILECs, because they could be hit twice with significant revenue losses due to regulatory action, given that the CALLS proposal required the LECs to make a substantial reduction in access charges this year, and this special access proceeding put a significant amount of annual special access revenues at risk without a possibility to recoup the lost revenues with a low-end adjustment. The briefing sheet went on to say that incumbent carriers initially felt that they could

[2] Section 563 of this statute provides for the establishment of a committee that, with the assistance of the relevant agency, will negotiate to reach a consensus on a given issue. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C.§ 564(a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b).

not agree to the CALLS proposal given the uncertainty relating to the special access issue, and therefore proposed that the Commission deal first with the special access issue, and then the CALLS proposal.

According to the briefing sheet, the Bureau objected to the incumbent carriers' original proposal because it might prevent the implementation of CALLS by July 1 and because with the overhang of a pending CALLS order, the credibility of a decision on the special access issue could be undercut. As a compromise, the ILECs were willing to postpone resolution of the special access rulemaking for a year, but wanted the Commission to clarify the meaning of the term "significant amount of local exchange service," which it used in the November 1999 Supplemental Order in this docket. In the briefing sheet, the Bureau embraced the incumbent carriers' position, recommending that the Commission "clarify" the existing supplemental order to provide a more detailed definition of "significant amount of local exchange service" and defer the further rulemaking until 2001. It therefore comes as no surprise whatsoever to find the Commission a few months later taking precisely this course.

Given these facts, it is simply not plausible to think of this order as anything but a part of the CALLS deal, although the order itself nowhere acknowledges the connection between these two dockets. Under these circumstances, even if I agreed with its substance, which I do not, I would be unable to join this order. The public generally has never been made aware that the outcome of the CALLS proposal hinged on the Commission's resolution of this item, and it therefore had no opportunity to comment meaningfully on this issue. Equally disturbing is the failure of this Commission to maintain the strict neutrality demanded of an agency engaged in rulemaking. Its participation in the CALLS negotiations, however well-meaning, has improperly influenced its decision in a separate docket. The order here is ineradicably tainted by the Commission's participation in the CALLS negotiations, and the process by which this order has been adopted falls short of the principles of openness and transparency that should govern the behavior of all administrative agencies.

Chairman Kennard, in his separate statement, asserts that the Commission has simply considered "overlapping policy considerations" between these separate dockets.[3] To think otherwise, he claims, is "to put blinders on" to avoid "seeing

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[3] The Chairman asserts that five parties submitted comments that "recogniz[ed] the link between special access and switched access," which he suggests demonstrates that the public was aware of the "policy considerations" common to both dockets. Notably, three of these commenters (Bell Atlantic, GTE, and Sprint) were members of the Coalition, and therefore well aware of the link that the Commission had drawn internally between these two proceedings. And it is not surprising that MCI and the National Exchange Carriers Association, *et al.*, persons that appear frequently in matters before the Commission, may have gotten wind of the connection between (continued....)

the entire landscape," preventing the Commission from "get[ting] where we want to be." But these metaphors apply far more aptly to the Commission itself. By shielding from public scrutiny the totality of the deal it made with a select group of parties with interests in the CALLS proposal, it is the Commission that wishes to blind the public to the "entire landscape." I certainly have no objection to the Commission's trying to reach a desirable outcome. I would simply like for us to reach our goals through a forthright process that is consistent with the law.

The Use Restrictions that the Commission Places on the Enhanced Extended Link Are Inconsistent with the Statute. The Commission postpones yet again a decision on how to solve a problem created by last year's *UNE Remand Order*,[4] which requires incumbent local exchange carriers to offer loop/transport combinations as unbundled network elements. Incumbent carriers are concerned that competitors will purchase these combinations, at TELRIC rates, and offer the combinations to customers as a substitute for the existing special access services that they currently purchase, at tariffed rates subject to price-cap regulation, from incumbents. Various parties have urged the Commission to restrict the uses to which competitors may put these combinations, in order to prevent competitors from undercutting the prices charged for special access services. In two orders issued last year, the Commission imposed "interim" restrictions on the ways in which carriers could use the loop/transport combinations and postponed deciding whether such restrictions were consistent with the statute. This order again postpones finally resolving the issue.

I disagree with the Commission's decision in two key respects. ***First***, I believe that postponing a decision on the merits of this issue violates the timetable for establishing unbundling requirements set forth in the 1996 Act. Specifically, the statute requires the Commission to implement section 251's requirements expeditiously, thereby giving carriers certainty regarding their obligations and rights under the 1996 Act. *See* 47 U.S.C. § 251(d)(1) ("Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."). Since 1996, the Commission has ignored this statutory directive with respect to this special access issue. In the *Local Competition First Report & Order*,[5] it refused to resolve the problem and instead

(Continued from previous page)
this docket and the CALLS proceeding. MCI has, of course, also challenged the propriety of the process by which the Commission conducted the CALLS negotiations.

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98 (rel. Nov. 5, 1999).

[5] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (1997) (hereinafter *Local Competition First Report and Order*).

asked interested parties to submit comments. It punted again last fall, when it ruled that the record needed further development in order for it to resolve the issue.

Yet again, the Commission avoids answering this question. It claims to need more time to "compile an adequate record for addressing the legal and policy disputes presented here." *Supplemental Order Clarification* ¶ 1. I do not understand why. Both the *Local Competition First Report & Order* and last year's *UNE Remand Order* asked parties to comment on whether there is any statutory basis for "limiting an incumbent LEC's obligation to provide entrance facilities as an unbundled network element." *See id.* ¶ 495. Interested parties have had a more than adequate opportunity to weigh in on the issue, and to the extent that empirical evidence informs this issue, parties have submitted such data. There is no reason why the Commission cannot answer this question today – no reason, that is, other the Commission's agreement with the incumbent carrier members of CALLS that it would delay resolution of this matter until next year. Not only is the Commission's refusal to decide the matter inconsistent with section 251(d)(1), but also it has led to needless litigation on the issue in the D.C. Circuit. *See* Br. of AT&T, *AT&T v. FCC*, No. 99-1538 (D.C. Cir.).

Second, I believe that the "interim" use restrictions imposed by this order are at odds with sections 251(c)(3) and 251(d)(2). As the Commission recognized in the *Local Competition First Report and Order*, 11 FCC Rcd 15499, 15679 [¶ 356], section 251(c)(3) places no restriction on the uses to which a requesting carrier may put an unbundled network element. Nor does the Act authorize the Commission to limit the ways in which a requesting carrier may use an incumbent's network elements. Section 251(c)(3) simply imposes on incumbents the duty to give requesting carriers nondiscriminatory access to unbundled network elements "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Thus, so long as a competitor uses unbundled network elements to provide "a telecommunications service" – and exchange access service is inarguably a telecommunications service – that use is permissible under section 251(c)(3).

The Commission now suggests that a use restriction could be based on language in section 251(d)(2), which provides that the Commission, in determining whether a network element should be unbundled, must consider whether lack of access to that element "would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." *See Supplemental Order Clarification* ¶ 17 (citing 47 U.S.C. § 251(d)(2)(B)). The Commission's reasoning stretches the language of this provision past the breaking point. The straightforward way to apply this subsection is first to identify the service the requesting carrier "seeks to offer" and then to determine whether lack of access to a given network element would "impair" the carrier's ability to provide that service. There is no basis in section 251(d)(2)(B) for then layering restrictions on the requesting carrier's use of the network element.

If there is a problem here, the solution lies not in coming up with detailed and hard-to-enforce definitions of "significant amount of local usage." Instead, the Commission should confront the real problem: whether local transport should be unbundled in all circumstances or whether its UNE pricing rules make sense. I urge the parties to this proceeding to build a record that addresses these issues, rather than urge the Commission to perpetuate its misguided use restrictions.

EXHIBIT MEW-3

GARY E. WALSH
EXECUTIVE DIRECTOR
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The Public Service Commission
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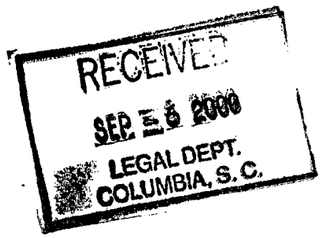
September 1, 2000



Mr. C. L. Addis
Manager – Regulatory Matters
BellSouth Telecommunications
1600 Hampton Street, Suite 805
Post Office Box 752
Columbia, South Carolina 29202

In Re: Docket No. 1998-035-C- Application for Approval of Negotiated Agreement between BellSouth Telecommunications, Inc. and TriVergent Communications, Inc. f/k/a State Communications, Inc.

Dear Mr. Addis:

The Negotiated Interconnection, Unbundling, and Resale Agreement between BellSouth Telecommunications, Inc. and TriVergent Communications, Inc. f/k/a State Communications, Inc. was presented to the Commission for consideration during its Regular Business Session on August 29, 2000.

After consideration, the Commission approved this Agreement since it is consistent with the standards of Section 252 (a) (1) of the Telecommunications Act of 1996 and since it is not discriminatory and is consistent with the public interest in that it promotes competition.

Consistent with previous Commission Orders, the Commission finds that the terms of this Interconnection, Unbundling, and Resale Agreement are not to be considered as a precedential standard for other agreements, nor are they binding on any other communications carrier.

Sincerely yours,

James M. McDaniel
Utilities Department

JMM:

EXHIBIT MEW-4

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and TriVergent Communications, Inc. ("TCI"), a South Carolina corporation, on behalf of itself and its certificated operating affiliates identified in Part C hereof, and shall be deemed effective as of June 30, 2000. This Agreement may refer to either BellSouth or TCI or both as a "Party" or "Parties ".

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company ("ILEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, TCI is an alternative local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, for TCI to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and TCI agree as follows:

1. **Purpose**

The resale, access and interconnection obligations contained herein enable TCI to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that TCI will not be considered to have offered telecommunications services to the public in any state within BellSouth's region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. Furthermore, the Parties agree that execution of this agreement will not preclude either party from advocating its position before the Commission or a court of competent jurisdiction.

2. **Term of the Agreement**

2.1 The term of this Agreement shall be three years, beginning June 30, 2000 and shall apply to the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. If as of the expiration of this Agreement, a Subsequent Agreement (as defined in Section 2.2 below) has not been executed by the Parties, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration shall be as set forth in Section 2.4 below.

2.2 The Parties agree that by no later than one hundred and eighty (180) days prior to the expiration of this Agreement, they shall commence negotiations with regard to the terms, conditions and prices of resale and/or local interconnection to be effective beginning on the expiration date of this Agreement ("Subsequent Agreement").

2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2, above, the Parties are unable to satisfactorily negotiate new resale and/or local interconnection terms, conditions and prices, either Party may petition the Commission to establish appropriate local interconnection and/or resale arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection and/or resale arrangements no later than the expiration date of this Agreement. The Parties further agree that in the event the Commission does not issue its order prior to the expiration date of this Agreement, or if the Parties continue beyond the expiration date of this Agreement to negotiate the local interconnection and/or resale arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to the day following the expiration date of this Agreement.

2.4 Notwithstanding the foregoing, in the event that as of the date of expiration of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and either no arbitration proceeding has been filed in accordance with Section 2.3 above, or the Parties have not mutually agreed (where permissible) to extend the arbitration window for petitioning the applicable Commission(s) for resolution of those terms upon which the Parties have not agreed, then either Party may terminate this Agreement upon sixty (60) days notice to the other Party. In the event that BellSouth or TCI terminates this Agreement as provided above, BellSouth shall continue to offer services to TCI pursuant to the terms, conditions and rates set forth in BellSouth's Statement of Generally Available Terms (SGAT) to the extent an SGAT has been approved by the applicable Commission(s). If any state Commission has not approved a BellSouth SGAT, then upon BellSouth's termination of this Agreement as provided herein, BellSouth will continue to provide services to TCI

pursuant to BellSouth's then current standard interconnection agreement. In the event that the SGAT or BellSouth's standard interconnection agreement becomes effective as between the Parties, the Parties may continue to negotiate a Subsequent Agreement, and the terms of such Subsequent Agreement shall be effective retroactive to the day following expiration of this Agreement.

3. **Ordering Procedures**

3.1 To the extent not already provided, State shall provide BellSouth its Carrier Identification Code (CIC), Operating Company Number (OCN), Group Access Code (GAC) and Access Customer Name and Address (ACNA) code as applicable prior to placing its first order.

3.2 The Parties agree to adhere to the BellSouth Local Interconnection and Facility Based Ordering Guide and Resale Ordering Guide, as appropriate for the services ordered, provided however that nothing required in these guides shall override TCI's rights or BellSouth's obligations under this Agreement.

3.3 TCI shall pay charges for Operational Support Systems (OSS) as specifically set forth in Attachments 1, 2, 3, 5 and 7 of this agreement, as applicable.

4. **Parity**

When TCI purchases, pursuant to Attachment 1 of this Agreement, telecommunications services from BellSouth for the purposes of resale to end users, BellSouth shall provide said services so that the services are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its affiliates, subsidiaries and end users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to TCI shall be at least equal in quality to that which BellSouth provides to itself. The provisioning intervals for network elements shall be at least equal to, but no longer than, those that BellSouth provides to itself. BellSouth shall make available network elements to TCI on the same terms and conditions as BellSouth provides to its affiliates, subsidiaries, end-users and any other carriers. The quality of the interconnection between the networks of BellSouth and the network of TCI shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by end users and service quality as perceived by TCI.

5. **White Pages Listings**

BellSouth shall provide TCI and its customers access to white pages directory listings under the following terms:

5.1 Listings. BellSouth or its agent will include TCI residential and business customer listings in the appropriate White Pages (residential and business) or alphabetical directories. Directory listings will make no distinction between TCI and BellSouth subscribers.

5.2 Rates. BellSouth and TCI will provide to each other subscriber primary listing information in the White Pages at no charge except for applicable service order charges as set forth in the applicable tariffs.

5.3 Procedures for Submitting TCI Subscriber Information. BellSouth will provide to TCI a magnetic tape or computer disk containing the proper format for submitting subscriber listings. TCI will be required to provide BellSouth with directory listings and daily updates to those listings, including new, changed, and deleted listings, in an industry-accepted format. These procedures are detailed in BellSouth's Local Interconnection and Facility Based Ordering Guide.

5.3.1 Notwithstanding any provision(s) to the contrary, TCI agrees to provide to BellSouth, and BellSouth agrees to accept, TCI's Subscriber Listing Information (SLI) relating to TCI's customers in the geographic area(s) covered by this Interconnection Agreement. TCI authorizes BellSouth to release all such TCI SLI provided to BellSouth by TCI to qualifying third parties via either license agreement or BellSouth's Directory Publishers Database Service (DPDS), General Subscriber Services Tariff, Section A38.2, as the same may be amended from time to time. Such TCI SLI shall be intermingled with BellSouth's own customer listings of any other CLEC that has authorized a similar release of SLI. Where necessary, BellSouth will use good faith efforts to obtain state commission approval of any necessary modifications to Section A38.2 of its tariff to provide for release of third party directory listings, including modifications regarding listings to be released pursuant to such tariff and BellSouth's liability thereunder. BellSouth's obligation pursuant to this Section shall not arise in any particular state until the commission of such state has approved modifications to such tariff.

5.3.2 No compensation shall be paid to TCI for BellSouth's receipt of TCI SLI, or for the subsequent release to third parties of such SLI. In addition, to the extent BellSouth incurs costs to modify its systems to enable the release of TCI's SLI, or costs on an ongoing basis to administer the release of TCI SLI, TCI shall pay to BellSouth its proportionate share of the reasonable and nondiscriminatory costs associated therewith.

5.3.3 BellSouth shall not be liable for the content or accuracy of any SLI provided by TCI under this Agreement. TCI shall indemnify, hold harmless and defend

BellSouth from and against any damages, losses, liabilities, demands claims, suits, judgments, costs and expenses (including but not limited to reasonable attorneys' fees and expenses) arising from BellSouth's tariff obligations or otherwise and resulting from or arising out of any third party's claim of inaccurate TCI listings or use of the SLI provided pursuant to this Agreement. BellSouth shall forward to TCI any complaints received by BellSouth relating to the accuracy or quality of TCI listings.

5.3.4 Listings and subsequent updates will be released consistent with BellSouth system changes and/or update scheduling requirements.

5.4 Unlisted/Non-Published Subscribers. TCI will be required to provide to BellSouth the names, addresses and telephone numbers of all TCI customers that wish to be omitted from directories.

5.5 Inclusion of TCI Customers in Directory Assistance Database. BellSouth will include and maintain TCI subscriber listings in BellSouth's directory assistance databases at no charge. BellSouth and TCI will adhere to appropriate procedures regarding lead time, timeliness, format and content of listing information as set forth in the BellSouth Local Interconnection and Facility Based Ordering Guide.

5.6 Listing Information Confidentiality. BellSouth will accord TCI's directory listing information the same level of confidentiality that BellSouth accords its own directory listing information, and BellSouth shall limit access to TCI's customer proprietary confidential directory information to those BellSouth employees who are involved in the preparation of listings.

5.7 Optional Listings. Additional listings and optional listings will be offered by BellSouth at tariffed rates as set forth in the General Subscriber Services Tariff.

5.8 Delivery. BellSouth or its agent shall deliver White Pages directories to TCI subscribers at no charge and within the same time frame as BellSouth delivers such directories to its own subscribers.

6. **Bona Fide Request/New Business Request Process for Further Unbundling**

Subject to 47 C.F.R. 51.317 and 47 C.F.R. 51.319 BellSouth shall, upon request of TCI, provide to TCI access to network elements not identified in this agreement at any technically feasible point for the provision of TCI's telecommunications service. . Any request by TCI for access to a network element, interconnection option, or for the provisioning of any service or product that is not already available shall be treated as a Bona Fide Request/New Business Request, and shall be submitted to BellSouth pursuant to the Bona Fide Request/New Business Request process set forth in Attachment 12 of this Agreement.

7. **Local Dialing Parity**

BellSouth shall provide local dialing parity as described in the Act and required by FCC rules, regulations and policies. TCI End Users shall not have to dial any greater number of digits than BellSouth End Users to complete the same call. In addition, TCI End Users shall experience at least the same service quality as BellSouth End Users in terms of post-dial delay, call completion rate and transmission quality.

8. **Court Ordered Requests for Call Detail Records and Other Subscriber Information**

8.1 To the extent technically feasible, BellSouth maintains call detail records for TCI end users for limited time periods and can respond to subpoenas and court ordered requests for this information. BellSouth shall maintain such information for TCI end users for the same length of time it maintains such information for its own end users.

8.2 TCI agrees that BellSouth will respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to TCI end users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.3 TCI agrees that in cases where TCI receives subpoenas or court ordered requests for call detail records for targeted telephone numbers belonging to TCI end users, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.4 Where BellSouth is providing to TCI telecommunications services for resale or providing to TCI the local switching function, then TCI agrees that in those cases

where TCI receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to TCI end users, if TCI does not have the requested information, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Where the request has been forwarded to BellSouth, billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.5 TCI will provide TCI end user and/or other customer information that is available to TCI in response to subpoenas and court orders for their own customer records. BellSouth will redirect subpoenas and court ordered requests for TCI end user and/or other customer information to TCI for the purpose of providing this information to the law enforcement agency.

9. **Liability and Indemnification**

9.1 BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing, or its lack of action in preventing, unbillable or uncollectible TCI revenues.

9.2 TCI Liability. In the event that TCI consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of TCI under this Agreement.

9.3 Liability for Acts or Omissions of Third Parties. Neither BellSouth nor TCI shall be liable for any act or omission of another telecommunications company providing a portion of the services provided under this Agreement.

9.4 Limitation of Liability.

9.4.1 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by TCI, any TCI Customer or by any other Person or entity, for damages associated with any of the services provided by BellSouth pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, BellSouth's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by TCI, any TCI Customer or any other Person or entity, resulting from the gross negligence or willful misconduct of BellSouth, shall not be subject to such limitation of liability.

9.4.2 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by BellSouth, any BellSouth Customer or by any other Person or entity, for damages associated with any of the services provided by TCI

pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, TCI's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by BellSouth, any BellSouth Customer or any other Person or entity resulting from the gross negligence or willful misconduct of TCI, shall not be subject to such limitation of liability.

9.4.3 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its Customer and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to Customer or third Party for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such Loss and (ii) Consequential Damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a Loss as a result thereof, such Party shall indemnify and reimburse the other Party for that portion of the Loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such Loss.

9.4.4 Neither BellSouth nor TCI shall be liable for damages to the other's terminal location, POI or other company's customers' premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a company's negligence or willful misconduct or by a company's failure to properly ground a local loop after disconnection.

9.4.5 Except in case of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the Services, or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

9.5 Indemnification for Certain Claims. The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or

damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement.

9.6 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

10. Intellectual Property Rights and Indemnification

10.1 No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. TCI is strictly prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark.

10.2 Ownership of Intellectual Property. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.

10.3 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 8 of this Agreement.

10.4 Claim of Infringement. In the event that use of any facilities or equipment (including software), becomes, or in reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense, but subject to the limitations of liability set forth below:

10.4.1 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or

10.4.2 obtain a license sufficient to allow such use to continue.

10.4.3 In the event 9.4.1 or 9.4.2 are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.

10.5 Exception to Obligations. Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.

10.6 Exclusive Remedy. The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.

11. Treatment of Proprietary and Confidential Information

11.1 Confidential Information. It may be necessary for BellSouth and TCI to provide each other with certain confidential information, including trade secret information, including but not limited to, technical and business plans, technical information, proposals, specifications, drawings, procedures, customer account data, call detail records and like information (hereinafter collectively referred to as "Information"). All Information shall be in writing or other tangible form and clearly marked with a confidential, private or proprietary legend and that the Information will be returned to the owner within a reasonable time. The Information shall not be copied or reproduced in any form. BellSouth and TCI shall receive such Information and not disclose such Information. BellSouth and TCI shall protect the Information received from distribution, disclosure or

dissemination to anyone except employees of BellSouth and TCI with a need to know such Information and which employees agree to be bound by the terms of this Section. BellSouth and TCI will use the same standard of care to protect Information received as they would use to protect their own confidential and proprietary Information.

11.2 Exception to Obligation. Notwithstanding the foregoing, there will be no obligation on BellSouth or TCI to protect any portion of the Information that is: (1) made publicly available by the owner of the Information or lawfully disclosed by a Party other than BellSouth or TCI; (2) lawfully obtained from any source other than the owner of the Information; or (3) previously known to the receiving Party without an obligation to keep it confidential.

12. **Assignments**

Neither Party hereto may assign or otherwise transfer its rights or obligations under this Agreement, except with the prior written consent of the other Party hereto, which consent shall not be unreasonably withheld; provided, however, that, so long as the performance of any assignee is guaranteed by the assignor: (i) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other Party, to any Affiliate of such Party and (ii) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other, to any person or entity that obtains control of all or substantially all of such assigning Party's assets, by stock purchase, asset purchase, merger, foreclosure, or otherwise. Each Party shall notify the other in writing of any such assignment. Nothing in this Section is intended to impair the right of either Party to utilize subcontractors.

13. **Escalation Procedures**

Each Party hereto shall provide the other party hereto with the names and telephone numbers or pagers of their respective managers up to the Vice Presidential level for the escalation of unresolved matters relating to their performance of their duties under this Agreement. Each Party shall supplement and update such information as necessary to facilitate prompt resolution of such matters. Each Party further agrees to establish an automatic internal escalation procedure relating to unresolved disputes arising under this Agreement.

14. **Expedite Procedures**

Each Party shall promptly establish a nondiscriminatory procedure for expediting installation and repair of facilities provided pursuant to this Agreement.

15. **Resolution of Disputes**

Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission, the FCC or a court of law for resolution of the dispute. Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their obligations under the Agreement while any dispute resolution is pending

16. **Taxes**

16.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

16.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

16.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

16.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

16.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

16.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

16.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

16.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing

Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.

16.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party.

16.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.

16.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing

Party at the time that the respective service is billed. The Parties agree to use best efforts to bill taxes promptly.

16.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. Both Parties shall retain the right to contest the imposition of such taxes and fees. However, the Party contesting the imposition of such taxes and fees shall bear the resulting expense.

16.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

17. **Network Maintenance and Management**

17.1 The Parties shall work cooperatively to implement this Agreement. The Parties shall exchange appropriate information (e.g., maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government, etc.) as reasonably required to implement and perform this Agreement.

17.2 Each Party hereto shall design, maintain and operate their respective networks as necessary to ensure that the other Party hereto receives service quality which is consistent with generally accepted industry standards at least at parity with the network service quality given to itself, its Affiliates, its End Users or any other Telecommunications Carrier.

17.3 Neither Party shall use any service or facility provided under this Agreement in a manner that impairs the quality of service to other Telecommunications Carriers' or to either Party's End Users. Each Party will provide the other Party notice of any such impairment at the earliest practicable time.

17.4 BellSouth agrees to provide TCI prior notice consistent with applicable FCC rules and the Act of changes in the information necessary for the transmission and routing of services using BellSouth's facilities or networks, as well as other changes that affect the interoperability of those respective facilities and networks. This Agreement is not intended to limit BellSouth's ability to upgrade its network through the incorporation of new equipment, new software or otherwise so long as such upgrades are not inconsistent with BellSouth's obligations to TCI under the terms of this Agreement.

18. **Changes In Subscriber Carrier Selection**

18.1 Both Parties hereto shall apply all of the principles set forth in 47 C.F.R. § 64.1100 to the process for End User selection of a primary Local Exchange Carrier. BellSouth shall not require a disconnect order from an TCI Customer or another LEC in order to process an TCI order for Resale Service for an TCI End User. Until the FCC or the Commission adopts final rules and procedures regarding a Customer's selection of a primary Local Exchange Carrier, unless already done so, TCI shall deliver to BellSouth a Blanket Representation of Authorization that applies to all orders submitted by TCI under this Agreement that require a primary Local Exchange Carrier change. Both Parties hereto shall retain on file all applicable documentation of authorization, including letters of authorization, relating to their End User's selection as its primary Local Exchange Carrier, which documentation shall be available for inspection by the other Party hereto upon reasonable request during normal business hours.

18.2 If an End User denies authorizing a change in his or her primary Local Exchange Carrier selection to a different local exchange carrier ("Unauthorized Switching"),

the Party receiving the End User complaint shall switch or caused to be switched that End User back to his preferred carrier in accordance with Applicable Law.

19. **Force Majeure**

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

20. **Year 2000 Compliance**

Each Party warrants that it has implemented a program the goal of which is to ensure that all software, hardware and related materials (collectively called "Systems") delivered, connected with BellSouth or supplied in the furtherance of the terms and conditions specified in this Agreement: (i) will record, store, process and display calendar dates falling on or after January 1, 2000, in the same manner, and with the same functionality as such software records, stores, processes and calendar dates falling on or before December 31, 1999; and (ii) shall include without limitation date data century recognition, calculations that accommodate same century and multicentury formulas and date values, and date data interface values that reflect the century.

21. **Modification of Agreement**

21.1 BellSouth shall make available, pursuant to 47 USC § 252(i) and the FCC rules and regulations regarding such availability, to TCI at the same rates and terms and conditions of any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC § 252. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement and for the identical term of such other agreement.

21.2 If TCI changes its name or makes changes to its identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of TCI to notify

BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

21.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

21.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

21.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TCI or BellSouth to perform any material terms of this Agreement, TCI or BellSouth may, on fifteen (15) business days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) business days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth in Section 12. In the event that the Parties reach agreement as to the new terms consistent with the above, the Parties agree to make the effective date of such amendment retroactive to the effective date of such Order consistent with this section, unless otherwise stated in the relevant Order.

22. **Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

23. **Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.

24. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

25. **Notices**

25.1 Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, addressed to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

TriVergent Communications, Inc.

TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601

Hamilton E. Russell, III
Executive Vice President of Regulatory Affairs
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: brussell@trivergent.com
Phone: 864-331-7323
Facsimile: 864-331-7144

and

Riley Murphy, Esq.
General Counsel
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: rmurphy@trivergent.com
Phone: 864-331-7318
Facsimile: 864-331-7146

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

25.2 Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

25.3 BellSouth shall provide TCI notice via Internet posting of price changes and of changes to the terms and conditions of services available for resale.

26. **Relationship of Parties**

This Agreement shall not establish, be interpreted as establishing, or be used by either Party to establish, or to represent their relationship as any form of agency, partnership or joint venture. Neither Party shall have any authority to bind the other or to act as an agent for the other unless written authority, separate form this Agreement, is provided. Nothing in this Agreement shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties. Nothing herein shall be construed as making either Party responsible or liable for the obligations and undertakings of the other Party.

27. **Third Party Beneficiaries**

This Agreement does not provide, and shall not be construed to provide, third parties with any benefit, remedy, claim, liability, reimbursement, cause of action, or other privilege.

28. **Cooperation on Preventing End User Fraud**

The Parties agree to cooperate fully with one another to investigate, minimize, prevent, and take corrective action in cases of fraud.

29. **Good Faith Performance**

In the performance of their obligations under this Agreement the Parties will act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action will not be unreasonably delayed, withheld or conditioned.

30. **Independent Contractors**

Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement, and retains full control over the employment, direction, compensation and discharge of its employees assisting in the performance of such obligations. Each Party shall be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes and all other regulations governing such matters. Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (i) its own acts and performance of all obligations imposed by Applicable Law in connection with its activities, legal status and property, real or personal and, (ii) the acts of its own Affiliates, employees, agents and contractors during the performance of the Party's obligations hereunder.

31. **Subcontracting**

If any obligation is performed through a subcontractor, each Party shall remain fully responsible for the performance of this Agreement in accordance with its terms, including any obligations either Party performs through subcontractors, and each Party shall be solely responsible for payments due the Party's subcontractors. No contract, subcontract or other Agreement entered into by either Party with any third party in connection with the provision of any facilities or services provided herein, shall provide for any indemnity, guarantee or assumption of liability by, or other obligation of, the other Party to this Agreement with respect to such arrangement, except as consented to in writing by the other Party. No subcontractor shall be deemed a third party beneficiary for any purposes under this Agreement. Any subcontractor who gains access to CPNI or Confidential Information covered by this Agreement shall be required by the subcontracting Party to protect such CPNI or Confidential Information to the same extent that the subcontracting Party is required to protect the same under the terms of this Agreement.

32. **Severability**

If any term, condition or provision of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not invalidate the entire Agreement, unless such construction would be unreasonable. The Agreement shall be construed as if it did not contain the invalid or unenforceable provision or provisions, and the rights and obligations of each Party shall be construed and enforced accordingly. Provided, however, that in the event such invalid or unenforceable provision or provisions are essential elements of this Agreement and substantially impair the rights or obligations of either Party, the Parties shall promptly negotiate a replacement provision or provisions. If impasse is reached, the Parties will resolve said impasse under the dispute resolution procedures set forth in Section 13.

33. **Survival of Obligations**

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, and any obligation of a Party under the provisions regarding indemnification, Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination thereof.

34. **Customer Inquiries**

34.1 Each Party shall refer all questions regarding the other Party's services or products directly to the other Party at a telephone number specified by that Party.

34.2 Each Party shall ensure that each of their representatives who receive inquiries regarding the other Party's services: (i) provide the numbers described in Section 46.1 to callers who inquire about the other Party's services or products, and (ii) do

not in any way disparage or discriminate against the other Party or its products or services.

35. **Compliance with Applicable Law**

35.1 Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

35.2 Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

36. **Labor Relations**

Each Party shall be responsible for labor relations with its own employees. Each Party agrees to notify the other Party as soon as practicable whenever such Party has knowledge that a labor dispute concerning its employees is delaying or threatens to delay such Party's timely performance of its obligations under this Agreement and shall endeavor to minimize impairment of service to the other Party (by using its management personnel to perform work or by other means) in the event of a labor dispute to the extent permitted by Applicable Law.

37. **Compliance with the Communications Law Enforcement Act of 1994 ("CALEA")**

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each Party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such other Party's noncompliance, and shall at the non-compliant Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

38. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

39. **Rule of Construction**

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

40. **Headings of No Force or Effect**

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

41. **Multiple Counterparts**

This Agreement may be executed multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

42. **Implementation of Agreement**

If TCI is a facilities based provider or a facilities based and resale provider, this section shall apply. Within 60 days of the execution of this Agreement or within 30 days of TCI placing its first order, whichever is later, the Parties will adopt a schedule for the implementation of the Agreement. The schedule shall state with specificity time frames for submission of including but not limited to, network design, interconnection points, collocation arrangement requests, pre-sales testing and full operational time frames for the business and residential markets. An implementation template to be used for the implementation schedule is contained in Attachment 10 of this Agreement.

43. **Additional Fair Competition Requirements**

43.1 In the event that either Party transfers facilities or other assets to an Affiliate which are necessary to comply with its obligations under this Agreement, the obligations hereunder shall survive and transfer to such Affiliate.

43.2 BellSouth shall allow local exchange customers of TCI to select BellSouth for the provision of intraLATA toll services on a nondiscriminatory basis; provided, however, that prior to establishment of BellSouth as the intraLATA toll carrier for TCI local exchange customers, the Parties shall negotiate a billing and collections agreement on commercially reasonable terms whereby TCI shall bill the customer on BellSouth's behalf and shall collect from the customer and remit to BellSouth intraLATA toll revenues. TCI agrees to bill its customers on BellSouth's behalf for both presubscribed and "dial around" intraLATA toll traffic. The Parties shall exchange customer record data on a timely basis as necessary to bill such customers for intraLATA toll usage.

43.3 BellSouth shall not use information derived from providing services or facilities to TCI to create a lead or other information base for a "winback" sales program.

44. **Filing of Agreement**

Upon execution of this Agreement it shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act. If the regulatory agency imposes any filing or public interest notice fees regarding the filing or approval of the Agreement, TCI shall be responsible for publishing the required notice and the publication and/or notice costs shall be borne by TCI.

45. **Entire Agreement**

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

This Agreement may include attachments with provisions for the following services:

Network Elements and Other Services
Local Interconnection
Resale
Collocation

The following services are included as options for purchase by TCI. TCI shall elect said services by written request to its Account Manager if applicable.

Optional Daily Usage File (ODUF)
Enhanced Optional Daily Usage File (EODUF)
Access Daily Usage File (ADUF)
Line Information Database (LIDB) Storage
Centralized Message Distribution Service (CMDS)
Calling Name (CNAM)

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year above first written.

~~BellSouth~~ Telecommunications, Inc.

Signature

Jerry D. Hendrix
Name

Sr. Director
Title

06/30/2000
Date

TriVergent Communications, Inc.

Signature

Riley M. Murphy
Name

Sr. Vice President and General Counsel
Title

June 30, 2000
Date

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Centralized Message Distribution System is the Telcordia (formerly BellCore) administered national system, based in Kansas City, Missouri, used to exchange Exchange Message Interface (EMI) formatted data among host companies.

Commission is defined as the appropriate regulatory agency in each of the states in BellSouth's nine state region: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Daily Usage File is the compilation of messages or copies of messages in standard Exchange Message Interface (EMI) format exchanged from BellSouth to a CLEC.

Exchange Message Interface is the nationally administered standard format for the exchange of data among the Exchange Carriers within the telecommunications industry.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Intercompany Settlements (ICS) is the revenue associated with charges billed by a company other than the company in whose service area such charges were incurred. ICS on a national level includes third number and credit card calls and is administered by Telcordia (formerly BellCore)'s Calling Card and Third Number Settlement System (CATS). Included is traffic that originates in one Regional Bell Operating Company's (RBOC) territory and bills in another RBOC's territory.

Intermediary Function is defined as the delivery of traffic from TCI, a CLEC other than TCI or another telecommunications carrier through the network of BellSouth or TCI to an end user of TCI, a CLEC other than TCI or another telecommunications carrier.

Local Interconnection is defined as 1) the delivery of local traffic to be terminated on each Party's local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; 2) the LEC network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

Local Traffic is as defined in Attachment 3.

Message Distribution is routing determination and subsequent delivery of message data from one company to another. Also included is the interface function with CMDS, where appropriate.

Multiple Exchange Carrier Access Billing ("MECAB") means the document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF:), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by Telcordia (formerly BellCore) as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or CLECs or by one LEC in two or more states within a single LATA.

Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the following Network Elements: unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; signaling; access to call-related databases; dark fiber as set forth in Attachment 2 of this Agreement. BellSouth will provide packet switching capability only to the extent required pursuant to FCC rules. BellSouth will make Operator Call Processing and Directory Assistance Services available at the rates set forth in Exhibit C of Attachment 2 of this Agreement.

Non-Intercompany Settlement System (NICS) is the Telcordia (formerly BellCore) system that calculates non-intercompany settlements amounts due from one company to another within the same RBOC region. It includes credit card, third number and collect messages.

Percent of Interstate Usage (PIU) is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate "non-intermediary" minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all "non-intermediary", local , interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating Party pays services.

Percent Local Usage (PLU) is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all "non-intermediary" local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating Party pays minutes of use.

Revenue Accounting Office (RAO) Status Company is a local exchange company/alternate local exchange company that has been assigned a unique RAO code. Message data exchanged

among RAO status companies is grouped (i.e. packed) according to From/To/Bill RAO combinations.

Service Control Points ("SCPs") are defined as databases that store information and have the ability to manipulate data required to offer particular services.

Signal Transfer Points ("STPs") are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. STPs enable the exchange of Signaling System 7 ("SS7") messages between switching elements, database elements and STPs. STPs provide access to various BellSouth and third party network elements such as local switching and databases.

Signaling links are dedicated transmission paths carrying signaling messages between carrier switches and signaling networks. Signal Link Transport is a set of two or four dedicated 56 kbps transmission paths between TCI designated Signaling Points of Interconnection that provide a diverse transmission path and cross connect to a BellSouth Signal Transfer Point.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 ("Act") means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

SCHEDULE OF TRIVERGENT COMMUNICATIONS, INC. OPERATING AFFALIATES

Trivergent Communications, Inc. (AL, FL, GA, KY, LA, MS, NC, SC, TN)

9.3.5 Tandem Switching shall provide an alternate final routing pattern for TCI traffic overflowing from direct end office high usage trunk groups.

9.4 Tandem Switching shall meet or exceed (i.e., be more favorable to TCI) each of the requirements for Tandem Switching set forth in the following technical references:

9.4.1 Bell Communications Research TR-TSY-000540 Issue 2R2, Tandem Supplement, 6/1/90;

9.4.2 GR-905-CORE covering CCSNIS;

9.4.3 GR-1429-CORE for call management features; and

9.4.4 GR-2863-CORE and Telcordia (formerly BellCore) GR-2902-CORE covering CCS AIN interconnection

10. Combinations

10.1 For purposes of this Section, references to "Existing Combinations" of network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location.

10.2 EELs

10.2.1 Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 10.3 below.

10.2.2 Subject to Section 10.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 10.3 following. This offering is intended to provide connectivity from an end user's location through that end user's SWC to TCI's POP serving wire center. The circuit must be connected to TCI's switch for the purpose of provisioning telecommunications services, including but not limited to telephone exchange services, to TCI's end-user customers. Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"), the EEL will be connected to TCI's facilities in TCI's collocation space at the POP SWC. TCI may purchase BellSouth's access facilities between TCI's POP and TCI's collocation space at the POP SWC.

10.2.3 BellSouth shall provide EEL combinations to TCI in the state of Georgia regardless of whether or not such EELs constitute Existing Combinations so long

as such combinations are ordinarily combined in BellSouth's network. In all other states, BellSouth shall make available to TCI those EEL combinations described in Section 10.3 below only to the extent such combinations are Existing Combinations.

10.2.4 BellSouth will make available EEL combinations to TCI in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, of the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs, regardless of whether or not such EELs constitute Existing Combinations.

10.2.5 Additionally, BellSouth shall make available to TCI a combination of an unbundled loop and special access interoffice facilities. To the extent TCI will require multiplexing functionality in connection with such combination, BellSouth will provide access to multiplexing within the central office pursuant to the terms, conditions and rates set forth in its Access Services Tariffs. Where multiplexing functionality is required in connection with loop and transport combinations, such multiplexing will be provided at the rates and on the terms set forth in this Agreement.

10.3 EEL Combinations

10.3.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop

10.3.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop

10.3.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop

10.3.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop

10.3.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop

10.3.6 DS1 Interoffice Channel + DS1 Local Loop

10.3.7 DS3 Interoffice Channel + DS3 Local Loop

10.3.8 STS-1 Interoffice Channel + STS-1 Local Loop

10.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop

10.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

10.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop

10.3.12 4wire VG Interoffice Channel + 4-wire VG Local Loop

10.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

10.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

10.4 Other Network Element Combinations

In the state of Georgia, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below: (1) Existing Combinations of network elements other than EELs; and (2) combinations of network elements other than EELs that are not Existing Combinations but that BellSouth ordinarily combines in its network. In all other states, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below, combinations of network elements other than EELs only to the extent such combinations are Existing Combinations.

10.5 Special Access Service Conversions

10.5.1 TCI may not convert special access services to combinations of loop and transport network elements, whether or not TCI self-provides its entrance facilities (or obtains entrance facilities from a third party), unless TCI uses the combination to provide a "significant amount of local exchange service" (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer.

10.5.2 For the purpose of special access conversions, a "significant amount of local exchange service" is as defined in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"). The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order. When TCI requests conversion of special access circuits, TCI will self-certify to BellSouth in the manner specified in paragraph 29 of the June 2, 2000 Order that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where TCI is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order. In such case, TCI may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon TCI's request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance.

10.5.3 Upon request for conversions of up to 15 circuits from special access to EELs, BellSouth shall perform such conversions within seven (7) days from BellSouth's receipt of a valid, error free service order from TCI. Requests for conversions of

fifteen (15) or more circuits from special access to EELs will be provisioned on a project basis. Conversions should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when TCI requests a conversion. The Access Service Request process will be used for conversion requests.

10.5.4 BellSouth may, at its sole expense, and upon thirty (30) days notice to TCI, audit TCIs records not more than one in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that TCI is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from TCI.

10.6 Rates

10.6.1 Georgia

10.6.1.1 The non-recurring and recurring rates for the EEL combinations set forth in 10.3, whether or not such EELs are Existing Combinations, are as set forth in Exhibit A of this Attachment.

10.6.1.2 On an interim basis, for combinations of loop and transport network elements not set forth in Section 10.3, where the elements are not Existing Combinations but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

10.6.1.3 To the extent that TCI seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, TCI, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

10.6.2 All Other States

10.6.2.1 Subject to Section 10.2.3 and 10.4 preceding, for all other states, the non-recurring and recurring rates for the Existing Combinations of EELs set forth in

EXHIBIT MEW-5

BELLSOUTH

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

Jerry D. Hendrix
Executive Director

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March 15, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc.
Suite 500
301 North Main Street
Greenville, SC 29601

Dear Mr. Russell:

NuVox has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

> "We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NuVox.

NuVox is required to maintain appropriate records to support local usage and self-certification. ACA will audit NuVox's supporting records to determine compliance of

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NuVox's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. In accordance with the Supplemental Order, NuVox is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. Circuits found to be non-compliant with the certification provided by NuVox will be converted back to special access services and will be subject to the applicable non-recurring charges for those services. BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on April 15 at NuVox's office in Greenville, SC, or another NuVox location as agreed to by both parties. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NuVox plan for ACA to be on-site for two weeks. Our audit team will consist of three auditors and an ACA partner in charge.

NuVox will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

Enclosures

cc: Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)

Larry Fowler, ACA (via electronic mail)
John Heitmann, Kelley Drye & Warren LLP (via electronic mail)
Tony Nelson, NuVox (via electronic mail)
Jim Schenk, BellSouth (via electronic mail)

Audit to Determine the Compliance Of Circuits Converted by NuVox From BellSouth's Special Access Tariff to Unbundled Network Elements With The FCC Supplemental Order Clarification, Docket No. 96-98

Information to be Available On-site April 15

Prior to the audit, ACA or BellSouth will provide NuVox the circuit records as recorded by BellSouth for the circuits requested by NuVox that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NuVox self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NuVox's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NuVox is the end user's only local service provider.

- Please provide a Letter of Agency or other similar document signed by the end user, or
- Please provide other written documentation for support that NuVox is the end user's only local service provider.

Second Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.

- Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.
- Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NuVox chose for self certification, other supporting information may be required.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Direct Testimony of Michael E. Willis in Docket No. 2005-82-C to be served upon the following this September 7, 2005:

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Nyla M. Laney

PC Docs # 578975